TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~201~~ 44

BENJAMIN F. MURPHY AND BENJAMIN F. ALLEN, PLAINTIFFS IN ERROR,

vs.

DAVID KILLINGER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 7, 1867.

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1 Pleas in the Circuit Court of the United States of America for the northern district of Illinois, held at the United States court-room in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, district judge of said district, and in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said Circuit Court, on Friday, the fourteenth day of June, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the ninety-first year.

WILLIAM H. BRADLEY, *Clerk.*

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY & BENJAMIN F. ALLEN. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

2 Be it remembered, that on the tenth day of November, in the year of our Lord one thousand eight hundred and sixty-five, came David Killinger, plaintiff, by Gookins & Roberts his attorneys, and filed in the office of the clerk of the Circuit Court of the United States for the northern district of Illinois, at Chicago, in said district, his præcipe for a writ of summons against Benjamin F. Murphy and Benjamin F. Allen, defendants, and also at the same time filed in the said clerk's office his bond for costs in the said entitled cause, which said præcipe and bond are in the words and figures following, to wit:

United States Circuit Court, northern district of Illinois, Dec'r term, 1865.

Præcipe.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY & BENJAMIN F. ALLEN. } Assumpsit.

Damages, $15,000.

The clerk of the U. S. Circuit Court, northern district of Illinois, will please issue a summons in the above-entitled cause to the marshal of said district.

GOOKINS & ROBERTS,
Pl'ff's Att'ys.

3 Endorsed: Filed Nov. 10th, 1865. Wm. H. Bradley, cl'k.

Circuit Court, Dec'r term, A. D. 1865.

Bond.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY & BENJAMIN F. ALLEN. } In ass't.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action,

or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this 10th day of November, A. D. 1865.

GOOKINS & ROBERTS.

Endorsed: Filed Nov. 10th, A. D. 1865. W. H. Bradley, clerk.

4 And on this day, to wit, the tenth day of November, A. D. 1865, a writ of summons issued out of the said clerk's office against the said defendants in the said entitled cause, which said writ, together with the return of the marshal thereto attached, is in the words and figures following, to wit:

Writ of summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon Benjamin F. Murphy and Benjamin F. Allen, if they shall be found in your district, to be and appear before our judges of our Circuit Court of the United States for the northern district of Illinois at the next term thereof, to be holden at Chicago, in the district aforesaid, on the third Monday of December next, to answer unto David Killinger in a plea of trespass in the case upon premises, to his damage, as he alleges, of fifteen thousand dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the
5 Supreme Court of the United States of America, at Chicago aforesaid, this 10th day of November, in the year of our Lord one thousand eight hundred and sixty-five, and of our independence the 90th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[50-ct. stamp.]

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Know all men by these presents, that I have appointed and by these presents do appoint Spencer B. Webb my true and lawful deputy to execute the annexed writ, (David Killinger *vs.* Benjamin F. Murphy *et al.*,) and to make true return therein according to law.

[SEAL.] J. R. JONES,
United States Marshal of the Northern District of Illinois.

I have not been able to find either of the defendants named in the within writ in my district, and hence return the same not served

upon them or either of them, this 18th day of December, A. D. 1865.

J. R. JONES,
United Statss Marshal of the Northern District of Illinois.
By SPENCER B. WEBB,
Special Deputy.

Endorsed: Filed Dec'r 19th, A. D. 1865. Wm. H. Bradley, clerk.

6 And on this day, to wit, the second day of November, A. D. 1866, came the said plaintiff, by his attorneys, and filed in the said clerk's office his præcipe from alias writ of summons in the said entitled cause, which said præcipe is in the words and figures following, to wit:

United States Circuit Court.

Præcipe for alias writ.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY, BENJAMIN F. ALLEN. } Ass't.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

The clerk of said court will please issue an alias summons in the above-entitled cause and direct the same to the marshal of said district, returnable to the December term, 1866, of said court.

GOOKINS & ROBERTS,
Att'y's for P't'ff.

7 And on this day, to wit, the second day of November, A. D., 1866, an alias writ of summons issued out of the said clerk's office against the said defendants in the said entitled cause, which said alias writ, together with the return of the marshall thereto attached, is in the words and figures following, to wit:

Circuit Court of the United States of America, northern district of Illinois, *ss.*

Alias Writ.

The United States of America to the marshall of the northern district of Illinois, greeting:

We command you again that you summon Benjamin F. Murphy and Benjamin F. Allen, if they shall be found in your district, to be and appear before our judges of our Circuit Court of the United States for the Northern district of Illinois, at the next term thereof, to be holden at Chicago, in the district aforesaid, on the third Monday of December next, to answer unto David Killinger in a plea of trespass on the case upon promises, to his damages, as he al-
8 leges, of fifteen thousand dollars, and have you then and there this writ.

Witness the Hon. Salmon H. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this second day of November, in the year of our Lord one thousand eight hundred and sixty-six, and of our independence the 91st year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[50-cent revenue stamp canceled.]

NORTHERN DISTRICT OF ILLINOIS, *ss.*

Know all men by these presents, that I have appointed, and by these presents do appoint, R. W. Bridge my true and lawful deputy to execute the annexed writ, (David Killinger *vs.* Benjamin F. Murphy *et al*,) and to make true returns thereon according to law.

[SEAL.] J. R. JONES.

United States Marshall of the Northern District of Illinois.

I have executed the writ hereto attached by reading the same to and in the presence and hearing of Benjamin F. Allen therein named, on the 2d day of November, A. D. 1866, and to and
9 in the presence and hearing of Benjamin F. Murphy therein named, on the 19th day of November, in the year aforesaid.

J. R. JONES, *U. S. Marshall.*

By R. W. BRIDGE, *Spec. Dep.*

R. W. Bridge, being first duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return.

R. W. BRIDGE.

Subscribed and sworn to before me this 20th day of November, A. D. 1866.

P. A. HOYNE, *U. S. Com. N. D. Ill.*

[50-cent U. S. revenue stamp.]

Endorsed: "Filed Nov. 22d, A. D. 1866, Wm. H. Bradley, clerk."

And on this day, to wit, the twenty-sixth day of Novem-
10 ber, A. D. 1866, came the said plaintiff, by his attorneys, and filed in the said clerk's office his declaration in the said entitled cause, which said declaration is in the words and figures following, to wit:

December term, 1866.

Declaration.

UNITED STATES OF AMERICA, *Northern District of Illinois*:

David Killinger, a citizen of the State of Pennsylvania, complains of Benjamin F. Murphy, a citizen of the State of Illinois, and Benjamin F. Allen, a citizen of the State of Iowa, summoned &c., of a plea of trespass on the case upon promises, for that whereas heretofore, to wit, on the first day of January, A. D. 1865, at Chicago, to wit, at the Northern district of Illinois, in consideration that the said

plaintiff, at the request of the said defendants, partners by the name and style of Murphy & Allen, would deliver to the said defendants, partners as aforesaid, divers goods and chattels, to wit, a large number, to wit, one thousand slaughtered hogs, and a large number, to wit, fifteen hundred shoulders, and a large number, to wit, fifteen hundred hams, and a large number, to wit, fifteen hundred
11 sides, and a large quantity, to wit, seventy tierces of lard, and a large quantity, to wit, one hundred thousand pounds of meat, and a large quantity, to wit, twenty thousand pounds of lard of great value, to wit, of the value of twenty thousand dollars, to be sold and disposed of by the said defendants for and on account of the said plaintiff for a reasonable reward to the said defendants in that behalf, they the said defendants then and there undertook and promised the said plaintiff to endevour to sell and dispose of the said goods and chattels for the said plaintiff, and to render a just and true account of the sale thereof to said plaintiff of the moneys arising from such sale whenever, after such sale, the said defendants should be thereunto requested; and although the said plaintiff, confiding in the said promise and undertaking of the said defendants, did afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, deliver the said goods and chattels to the said defendants for the purpose aforesaid; and although the said defendants did afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, sell and dispose of the said goods and chattels, for and on account of the said plaintiff for divers sums of money, in the whole amounting to a large sum, to wit, the sum of twenty thousand dollars; and although the said plaintiff did afterwards, to wit, on the day and year aforesaid, to wit, at the district aforsaid, request the said defendants so to do, yet the said defendants have not rendered to the said plaintiff a just and true account or other account of the said goods and chattels or any part thereof, or of the moneys
12 arising from the sale thereof, or any part of the same, nor have they paid over to the said plaintiff the said sum of money, the proceeds of such sale, or any part thereof, but have wholly refused and still refuse so to do.

And whereas also heretofore, to wit, on the day and year aforesaid, to wit, at the district aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendants, had retained and employed the said defendants for commission and reward to them in that behalf to sell and dispose of certain other goods and chattels of the said plaintiff, of like number, quantity, quality, description and value as those in the first count mentioned, the said defendants then and there undertook and promised the said plaintiff to use due care in and about the sale of the said last-mentioned goods and chattels, and to endeavor to sell the same, and on sale thereof, to sell the same for the best price that could be obtained therefor; and although the said defendants afterwards, to wit, on the day and year aforesaid, to wit, at the district aforesaid, sold the said goods and chattels for a large sum, to wit, the sum of eight thousand dollars, yet the said defendants did not take due care in

and about the sale of said goods and chattels, and did not nor would upon sale thereof obtain therefor the best price that could be obtained for the same, but wholly neglected and refused so to do, and sold the said goods and chattels at less than could have been obtained for the same, to wit, in the sum of three thousand dollars.

13 And whereas also, the said defendants afterwards, to wit, on the first day of January, in the year of our Lord, one thousand eight hundred and sixty-five, to wit, at said district, became and were indebted to the plaintiff in a large sum of money, to wit, fifteen thousand dollars, for money before that time lent and advanced to said defendants by said plaintiff at said defendants request; and also in the like sum for money before that time paid, laid out and expended for said defendants by the said plaintiff at the like special request of said defendants; and in the like sum for money before that time had and received by said defendants, to and for the use of said plaintiff; and also, in the like sum for goods, wares, and merchandise before that time sold and delivered by said plaintiff to said defendants, at the like special instance and request; and also in the like sum for the labor, care, and diligence of the said plaintiff before that time done and performed by said plaintiff for said defendants, and at the like instance and request of said defendants; and being so indebted, said defendants, in consideration thereof, then and there undertook and promised to pay said plaintiff said several sums of money above mentioned, when thereunto afterwards requested.

And whereas also, the said defendants afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiff, and then and there being in arrears and un-

14 paid; and upon such accounting, the said defendants were found to be in arrear and indebted to said plaintiff in the further sum of fifteen thousand dollars; and being so found in arrear and indebted to said plaintiff, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, to pay unto the said plaintiff, the said sum of money last above mentioned, when they, the said defendants, should be thereunto afterwards requested.

Yet the said defendants, not regarding their said promises and undertakings, but contriving &c., although often requested so to do, have not paid said plaintiff either of said sums of money above mentionod, or any part thereof; but so to do have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of said plaintiff of fifteen thousand dollars, and therefore he brings this suit, etc.

GOOKINS & ROBERTS,
Plaintiff's Attorney.

15 *Copy of instrument and account sued on.*

Messrs. Murphey & Allen, in ac. with David Killinger, Dr.

1865.		
January.	For proceeds of the sale of pork, hams, shoulders, sides and lard sold by you on commission and not accounted for.....	$14,883 07
	For the price and value of hams, pork, lard, shoulders sides &c. purchased and taken by you.....	10,000 00
	For loss on sale of pork, hams, sides, shoulders and lard, by failure to sell at highest price.....	3,000 00
	Interest	1,000 00

To.	*Dr.*
To money lent and advanced.....	$15,000 00
To money paid, laid out and expended.....	15,000 00
To money had and received to and for the use of said plaintiff	15,000 00
To goods, wares and merchandise sold and delivered..	15.000 00
To labor and services.....	15,000 00
To balance due on account stated.....	15,000 00

Endorsed; Filed this 26th day of November, 1866. Wm. H. Bradley, clerk.

16 And on this day, to wit, the twentieth day of December, A. D, 1866, came the said defendants by Jno. N. Jewett, esq., their attorney, and filed in the said clerk's office their pleas in the said entitled cause, which said pleas are in the words and figures following, to wit:

In the Circuit Court of the United States for said northern district of Illinois of the December term, A. D. 1866.

Pleas.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHEY, impleaded with BENJ. F. Allen.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

And now comes the said defendant, Benjamin M. Murphey, impleaded as aforesaid, by Jno. N. Jewett, his attorney, and defends the wrong and injury, when, &c., and says that he did not, together with said Benjamin F. Allen, undertake or promise in any
17 manner and form as the said plaintiff hath above thereof complained against him, and of this the said Benjamin F. Murphey, impleaded as aforesaid, puts himself upon the country, &c. And for

a further plea in this behalf, by leave of the court, &c., the said defendant, Benjamin T. Murphey, by his attorney aforesaid, comes and defends the wrong and injury, when, &c., and prays judgment of the writ and declaration aforesaid, because he says that he did not make the said supposed promises or undertakings, or any or either of them, in the said declaration mentioned jointly, or as copartner with the said Benjamin F. Allen; but the said premises and undertakings, and each and every of them, (if any such were made,) were made by the said defendant, Benjamin F. Murphy and Miles Murphey, Robert P. Murphey and Leander E. Murphey, composing the firm of Miles Murphey & Co., without the said defendant, Benjamin F. Murphey, and this the said defendant, impleaded as aforesaid, is ready to verify; wherefore he prays judgment
18 of the said writ and declaration aforesaid, and that the same may be quashed, &c.

JNO. N. JEWETT,
Att'y of Def't, Murphey.

Endorsed: "Filed Dec. 20, 1866. Wm. H. Bradley, cl'k."

In the Circuit Court of the United States for the said northern dist. of Illinois, of the December term, A. D. 1866.

DAVID KILLINGER
vs.
BENJAMIN F. ALLEN, impleaded with BENJAMIN F. Murphey.

UNITED STATES OF AMERICA, *Northern District Illinois, ss*:

And the said defendant, Benjamin F. Allen, impleaded as aforesaid, by J. N. Jewett, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not, together with the said Benjamin F. Murphey, undertake and promise in manner and form as the said plaintiff hath above thereof complained against him, and of this, the said defendant, Benjamin F. Allen, im-
19 pleaded as aforesaid, puts himself upon the country, &c. And for a further plea in this behalf, by leave of the court, &c., the said defendant, Benjamin F. Allen, by his attorney aforesaid, comes and defends the wrong and injury, when, &c., and prays judgment of the writ and declaration aforesaid, because he says that he did not make the said supposed premises or undertakings, or any or either of them, in the said declaration mentioned, jointly, as copartner or otherwise, with the said Benjamin F. Murphey; but the said promises and undertakings, and each and every of them, (if any such were made,) were made by the said Benjamin F. Murphey and others composing the firm of Miles Murphey & Co., without the said defendant, Benjamin F. Allen, impleaded as aforesaid; and this the said defendant, impleaded as aforesaid, is ready to verify; wherefore he prays judgment of the said writ and declaration aforesaid, and that the same may be quashed, &c.

JNO. N. JEWETT,
Att'y for Def't, Allen.

20 STATE OF IOWA, *County of Polk, ss*:

Benjamin F. Allen, being first duly sworn, deposes and says that he is the defendant named in, and by whom the foregoing pleas are pleaded, and that the said pleas and the matters and things therein pleaded are true in substance and in fact.

BENJAMIN F. ALLEN.

Subscribed and sworn to before me, a notary public in and for said county of Polk, in the State of Iowa, this seventeenth day of December, A. D. 1866.

[SEAL.] W. S. PRITCHARD,
Notary Public.

[5-ct. stamp.]

Endorsed: "Filed Dec. 20, 1866. Wm. H. Bradley, cl'k.

21 And on this day, to wit, the eighth day of January, A. D. 1867, came the said plaintiff, by his attorney, and filed in the said clerk's office his replications in the said entitled cause, which said replications are in the words and figures following, to wit:

In the Circuit Court, December term, 1866.

Replications.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY AND BERJAMIN F. ALLEN.

UNITED STATES OF AMERICA, *Northern District of Illinois*:

And the said plaintiff, David Killinger, as to the plea of the said defendant, Benjamin F. Murphy, by him first above pleaded, and whereof he has put himself upon the country, does the like; and the said plaintiff, as to the said plea of the said Benjamin F. Murphy, defendant, by him secondly above pleaded, says precludi non; because he says that the said defendant, Benjaman F. Murphy
22 at the time, when, &c., when, &c., did make the said several promises and undertaking in the said declaration mentioned, jointly, as copartner with said defendant, Benjamin F. Allen, as set forth in the declaration, and of this he puts himself upon the country, &c.; and def't doth the like.

GOOKINS & ROBERTS, *P. Q.*

Endorsed: "Filed Jan'y 8, 1867. Wm. H. Bradley, cl'k."

In the Circuit Court, December term, 1866.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY & BENJAMIN F. ALLEN.

UNITED STATES OF AMERICA, *Northern District of Illinois:*

And now comes the said plaintiff, David Killinger, by Gookins & Roberts, his attorneys, and for replication to the plea of the said

Benjamin F. Allen, by him firstly above pleaded, by which he puts himself upon the country, doth the like, &c.

23 And for replication to the said plea of the said Benjamin F. Allen, by him secondly above pleaded, the said plaintiff, David Killinger, by his said attorneys, says precludi non, because he says that the said defendant, Benjamin F. Allen, did make the said promises and undertakings in the said declaration mentioned, jointly, as co-partner with the said Benjamin F. Murphy, as is in and by the said declaration mentioned, and of this he, the said plaintiff, puts himself upon the country, &c., and the defendant, Allen, doth the like, &c.

GOOKINS & ROBERTS, *P. Q.*

Endorsed: "Filed Jan'y 8, 1867. Wm. H. Bradley, clerk."

24 And on this day, to wit, the eighteenth day of February, A. D. 1767, came the said plaintiff, by his attorneys, and filed in the said clerk's office additional counts in the said entitled cause, which said additional counts, and agreement thereto attached, are in the words and figures following, to wit:

In the Circut Court of the United States for the northern district of Illinois.

Additional counts.

DVVID KILLINGER
vs.
BENJAMIN F. MURPHEY & BENJAMIN F. ALLEN. } Assumpsit.

Additional counts filed by agreement of parties.

And whereas also, heretofore, to wit, on the first day of November, 1864, at Des Moines, Iowa, to wit, at said district, in consideration that he, said plaintiff, at the special instance and request of defendants aforesaid, would deliver to the said defendants a large number, to wit, seven hundred live hogs of great value, to wit, of the value of twenty-five thousand dollars, to be by the said defendants within a reasonable time thereafter slaughtered and cut, and properly made into bulk-meat, and the lard therefrom rendered up and packed

25 into tierces, and said bulk-meat and lard to be shipped to Chicago, Illinois, and there, to wit, at said Chicago, sold for and on account of the plaintiff for a reasonable reward to the said defendants in that behalf, they the said defendants undertook, and then and there promised the said plaintiff that they would, within a reasonable time after the delivery of the said hogs to them, slaughter and cut, and properly make into bulk-meat the said hogs, and the lard therefrom render up and pack into tierces, and said bulk-meat and lard ship to Chicago, Illinois, and there, to wit, at said Chicago, sell the same for and on account of the plaintiff, and render a true account of the sale thereof, and of the monies arising from such sale whenever, after the sale thereof, they, the said defendants, should be there-

unto afterwards requested; and although the said plaintiff, confiding in the said promises and undertaking of the said defendants, did afterwards, to wit, on the day and year aforesaid, at Des Moines, to wit, at the district aforesaid, deliver the said hogs to the said defendants for the purpose aforesaid; and although the said defendants did afterwards, to wit, on the day and year aforesaid, at Des Moines, to wit, at the district aforesaid, slaughter, within a
26 reasonable time thereafter, and cut, and properly make into bulk-meat the said hogs, and the lard therefrom render up and pack into tierces, and said bulk-meat and lard ship to Chicago, Illinois, and there, to wit, at said Chicago, sell the same for and on account of the plaintiff for a large sum of money, to wit, for twenty-five thousand dollars; and although the said plaintiff afterwards, to wit, on the day and year aforesaid, at the district aforesaid, requested the said defendants to account to the said plaintiff and pay him the said sum of money arising from the said sale, yet the said defendants have refused so to do.

And whereas also, heretofore, to wit, on the first day of November, A. D. 1864, at Des Moines, Iowa, to wit, at said district, in consideration that the said plaintiff, at the special instance and request of the said defendants, would deliver to the said defendants a large number, to wit, seven hundred live hogs of great value, to wit, of the value of twenty-five thousand dollars, to be by the said defendants slaughtered and cut, and properly made into bulk-meat, and the lard therefrom rendered and packed into tierces at said Des Moines, and said bulk-meat and lard to be thereafter shipped to Chicago, Illinois,
27 and there sold for and on account of the said plaintiff by said defendants, when the plaintiff should order and direct, for a reasonable hire and reward to the defendants in that behalf, they, the said defendants, undertook, and then and there promised the plaintiff that they would, upon the delivery of the said live hogs to them as aforesaid, slaughter, cut, and properly make into bulk-meat the said hogs, and the lard therefrom render and pack into tierces, and said bulk-meat and lard ship to Chicago, Illinois, and there, to wit, at said Chicago, sell the same for and on account of the said plaintiff, when he the said plaintiff should so order and direct, and render to plaintiff a true account of the sale thereof, and of the monies arising from such sale, and pay to plaintiff such monies, whenever, after the sale, they, the said defendants, should be thereunto afterwards requested; and although the said plaintiff, confiding in the said promises and undertakings of the said defendants, did afterwards, to wit, on the day and year aforesaid, at Des Moines, Iowa, to wit, at said district, deliver the said hogs to the said defendants for the purpose and upon the terms aforesaid; and although the said defend-
28 ants did afterwards, to wit, on the day and year aforesaid, at Des Moines, Iowa, to wit, at said district, slaughter, cut, and properly make into bulk-meat the said hogs, and the lard therefrom render and pack into tierces, and said bulk-meat and lard ship to Chicago, Illinois; and although after the same was so at Chicago, Illinois, the said plaintiff, to wit, during the month of February,

1865, did order and direct the said defendants to sell the said bulk-meat and lard immediately after such order and direction, yet the said defendants refused then and there so to sell the same according to the said order and direction of the plaintiff and their said promise and undertaking. And plaintiff further says, that immediately after he gave the said defendants the said order and direction, the said bulk meat, amounting in weight to 400,000 pounds, might, and should have been, sold by defendants for a great price, to wit, the price of twenty cents per pound, yet the said defendants conducted themselves so negligently in the premises that they sold the said bulk-meat after the market price and value thereof at said Chicago had declined for a small sum, to wit, the sum of twelve cents per pound, for and on account of the said plaintiff; and although
29 the said plaintiff afterwards, to wit, on the day and year aforesaid, requested the said defendants to account to the said plaintiff and pay him the said sum of money for which the said bulk-meat should have been sold as aforesaid, after deducting the hire and reward as aforesaid to defendants, yet the said defendants have refused so to do.

And whereas also, heretofore, to wit, on the first day of November, 1864, at Des Moines, Iowa, to wit, at the said district, in consideration that he, said plaintiff, at the special instance and request of the said defendants, would deliver to the said defendants a large number, to wit, seven hundred live hogs of great value, to wit, of the value of forty thousand dollars, to be by the said defendants slaughtered, cut, and properly prepared, and made into bulk-meat, and the lard therefrom rendered and packed into tierces at said Des Moines, and said bulk-meat and lard to be thereafter shipped to Chicago, Illinois, and there sold for and on account of the said plaintiff by the said defendants for the best price that could be obtained therefor, for a reasonable hire and reward to the said defendants in that behalf, they, the said defendants, undertook, and then
30 and there promised the plaintiff that they would, after the delivery of the said hogs to them, as aforesaid, slaughter, cut, and properly prepare and make into bulk-meat the said hogs, and the lard therefrom render and pack into tierces, and said bulk-meat and lard ship to Chicago, Illinois, and there to wit, at said Chicago, sell the same for and in account of the said plaintiff for the best price that could be obtained therefor, and render to plaintiff a just and true account of the sale thereof, and pay over to him the monies arising from such sale whenever thereafter they should by plaintiff be thereunto requested; and plaintiff says, that relying on said promise and undertaking of the defendants, he did, afterwards, to wit, on the day and year aforesaid, deliver to the said defendants the said hogs at Des Moines, to wit, at the district aforesaid for the purpose and upon the terms aforesaid, yet the said defendants did not comply with their said promise and undertaking in that behalf, as aforesaid; but after they had slaughtered, cut, and properly prepared and made into bulk-meat, the said hogs, and the lard therefrom rendered and packed into tierces, and said bulk-meat and lard had shipped

31 to Chicago aforesaid, they, the said defendants, conducted themselves so negligently in and about the sale thereof, that they did not sell the same for the best price that could be obtained therefor, and render to plaintiff a just and true account of the sale thereof, and pay over to him the monies arising from such sale, but kept the said bulk-meat and lard in their possession for a long time, and until the price thereof had declined at said Chicago, and then, to wit, at said Chicago, sold the same at a great sacrifice and loss, and refused to account to and pay plaintiff, as aforesaid, upon request, by means whereof the plaintiff has sustained great damage; to the damage of plaintiff of thousand dollars, and therefore he brings suit.

GOOKINS & ROBERTS, *P. Q.*

It is agreed that the plaintiff may file the above and foregoing additional counts to his declaration, and that the pleas of the defendants, respectively, already filed should be considered as pleaded to the said above and foregoing additional counts, and the replications filed, as replied to said pleas.

32 CHICAGO, *Feb. 16th*, 1867.

J. N. JEWETT,
Att'y for Def'ts.
GOOKINS & ROBERTS,
Att'ys for Pl'fs.

Endorsed: "Filed Feb'y 18, 1867. Wm. H. Bradley, clerk."

33 And on this day, to wit, the twenty-ninth day of March, in the adjourned March term, A. D. 1867, of said court, in the record of the proceedings thereof in the said entitled cause, is the following entry, to wit:

Record.

DAVID KELLIGER
vs.
BENJAMIN F. MURPHY AND Benjamin F. Allen. } Assumpsit.

Now comes the parties by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: Luther Burley, P. Gunnell, Alfred Weston, John E. Whiting, J. P. True, W. P. Hewett, J. B. Martin, William Johnston, William M. Riggin, John Gray, Walter Sherman, and William S. Barnes, who were all duly elected, tried, and sworn, well and truly to try said issue; and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

34 And on this day, to wit, the thirteenth day of March, in the adjourned March term, A. D. 1867, of said court, in the record of the proceedings thereof in the said entitled cause is the following entry, to wit:

Record.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY AND Benjamin F. Allen. } Assumpsit.

Now come the parties again by their attorneys, and now come also the jury in this behalf empannelled and sworn, and after hearing additional evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until Monday morning next.

35 And on this day, to wit, the first day of April, in the adjourned March term, A. D. 1867, of said court, in the record of the proceedings thereof in the said entitled cause is the following entry, to wit:

Record.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY and Benjamin F. Allen. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empanelled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

36 And on this day, to wit, the second day of April, in the adjourned March term, A. D. 1867, of said court, in the record of the proceedings thereof in the said entitled cause, is the following entry, to wit:

Record.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY AND Benjamin F. Allen. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn, and after hearing the concluding arguments of counsel, and receiving the instructions of the court, the jury retire to consider of their verdict; and after a short absence the jury returned into court the following verdict, to wit: We, the jury, find the issue for the plaintiff, and assess his damages to the sum of nine thousand seven hundred and fifty-nine dollars and sixty-four cents; and thereupon the defendants, by their attorneys, move the court for a new trial herein.

37 On the hearing of said cause the following exceptions were allowed, and are as follows, to wit:

Circuit Court of the United States, northern district of Illinois, N. term, 1867.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY AND BENJAMIN F. ALLEN.

Be it remembered, that on the 29th day of March, A. D. 1867, that being one of the days of the March term, A. D. 1867, of said court, this cause having come on to be heard before the said court and a jury, the plaintiff, in order to sustain the issues on his c'p'nt, produced as a witness Miles Murphey, who, being first duly sworn, deposed as follows:

In 1864 I resided, and now reside, at New Castle, Indiana. In the fall of 1864 I was connected with a house in Chicago. We came here, I think, in 1863; cannot recollect. Had been in partnership one or two years; the commission house of Miles Murphey & Co., composed of myself, B. F. Murphy, and L. E. Murphey, my son. The partnership ran out in July, 1864. The house had done very well, and made a good deal of money, and they concluded they had no further use for me, and, as the boys said, "they kicked me out." I had no interest in the firm of Miles Murphey & Co. They then styled it Murphey & Co. from that time on. Hog-packing time came on in that year, 1864, and Frank Murphey was down below, and wanted me to come back and take an interest in the hog-packing. I hes-
38 itated some time, on two or three accounts. I hadn't much faith in the year; hogs got so high, and they had went into some wool transactions that didn't suit me. I had no interest in the wool. Frank and Mr. Mix were the leading men in that. By Frank I mean Benjamin F. Murphey; and Mr. Mix bought a large amount of wool while they were doing busiuess as Murphey & Co. I had no interest in the wool transactions, whatever; but I finally consented to take an interest in the packing of that firm. I saw Frank M. below, and he told me him and Allen was to pack 10 or 15,000 hogs at Des Moines, and the stuff should come through our house, and I came up here and agreed to go in with them, and then we made an agreement with regard to the Des Moines stuff. I made the agreement with B. F. Murphey; when, I cannot tell. It was sometime in November, I think, or December. It was about the time they were commencing packing out there, and about the time we commenced. We commenced right away after the arrangement was made. The arrangement was, what stuff came from Des Moines they were going to charge 2½ per cent., besides packing charges, and would give us one per cent., Miles Murphey & Co. one per cent. of that, and we were only to charge costs, and the work which we did to the meat at the pork house; charge what would cover the cost and one per cent. I then contended with him he ought at least to divide the proceeds; if he got 2½ per cent., give us one and a quarter. He said

no; and another house offered to do the business at one per
39 cent. and take the meat. So we finally agreed. We were to handle the meat they packed at Des Moines. He said several parties were going to pack; he didn't say who; but all the meat that was packed there was to come through our house, and we were to get one per cent. and charge for our labor at the pork house.

Question. Two and a half per cent. was the commission for selling?

Ans. Commission for doing the business; advancing, I suppose. Frank Murphey said it was doing the business at Des Moines; they was going to charge these men, that expected to have advanced their money, and was going to charge them 2½ per cent. over and above packing charges, and he agreed to give our firm, Murphy & Co., here one per cent. of the 2½.

Ques. Did not that include the selling of the pork-house?

Ans. Yes, sir; that was all that we was to have for selling here.

Ques. There was nothing said about selling here?

Ans. Frank Murphey managed the business of the Des Moines stuff. About all they packed at Des Moines, may be entirely, or the most of it, came to our house. It was owned by different parties. At the time Frank Murphey made the arrangement with our house, he named over several, but they were all strangers to me, and I didn't pay much attention to it. It didn't make any difference to me who owned the meat then, so they put it through our house. He said they intended to pack 10 or 15,000 hogs, and thought it would be quite an item to handle it, and I concluded to take it in the way named. I was there part of the time the pork was being sold.
40 I think the Des Moines stuff didn't commence coming until January, but wouldn't be certain about that. Frank Murphy made the sales of the Des Moines stuff, so far as I know. I don't think I ever sold any of it, nor did any other member of the house, except Frank Murphey, that I knew of. We divided off our work in this way: when I agreed to go in, R. P. Murphey was to go out to the stock yards and do the buying for our house. I stayed in the office, and my son had charge of the pork-house, and we had a book-keeper. My son is Leander. He stayed at the pork-house, and I stayed in the office nearly all the time; was at the porkhouse a few times. Frank Murphy left the city some time in April, I think nearly the middle of April. I was not there at the time; don't remember when he returned. He was gone some time and came back. I remember of the plaintiff's coming down to see me at my residence in Indiana, with reference to the hog product. He saw Frank here when he came back. He came over then to see me about it. I don't know as I am able to state what he said and what I said to him. He came to my house and we had a talk. He said that he was hunting his money, and wanted to know when to get it.

Ques. State what conversation you had and what you said to him?

(Question objected to by the defendant counsel, on the ground that the conversation inquired about was incompetent as evidence, neither of the defendants being present.)

Plaintiff's counsel then stated as follows: "I shall expect
41 to prove by another witness that Killinger was sent by B. F. Murphey to Miles Murphey with reference to them hogs, and therefore I suppose the conversation is competent;" and thereupon the objection was overruled by the court, and to the ruling of the court the defendant, by their counsel, then and there excepted.

Ans. I will state the substance. He said he had come down to hunt his money; that he was out of money, and that he had placed some hogs in Allin's hands in Des Moines.

(Defendant, by their counsel, here again objected to any conversation between plaintiff and witnesses relating to defendant, Allin's agreement or arrangement with plaintiff, as incompetent evidence, being but hearsay; but the objection was overruled by the court, and defendant, by their counsel, excepted.)

Ques. Did he say anything about Frank Murphy's sending him?

Ans. I think Frank Murphy, he said, he sent him down there.

Question. State what was said between you and him substantially.

(Defendants, by their counsel, again objected to this question and to the conversation called for as evidence, as hearsay and incompetent, neither of the defendants being present; but the objection was overruled by the court, and to the ruling of the court the defendants, by their counsel, then and there excepted.)

Ans. He said he had come from Des Moines and saw Frank
42 Murphey here, and he said that Frank Murphey refused to pay him or give him any satisfaction, and he had sent him down to me to see if he couldn't get his money out of me. I told him he had come to a bad place, the house had failed, and I didn't know anything about his matters any way; didn't know anything about the details of it. I knew he had some pork here; there had been some shipped in Des Moines. He went on to tell me he had placed it in Mr. Allin's hands, and it was sent here, and he was out $8,000 or $10,000; I forget the amount. I told him he couldn't get it out of me; I didn't know anything about it; didn't know anything about the details of the business, whether Frank Murphy had sold the meat, or anything about it. I knew he had sold the lard. I hadn't been here for some time before Frank went away. I think that is about the substance of what took place betwen me and Killinger. I told him that he need not look to me for the money.

Question. State whether or not you said to him at that time your house didn't recognize him in the transaction?

(Question objected to by defendants' counsel as leading, and calling for statements of third parties in the absence of defendants, which cannot be competent evidence against them. Objection overruled, and defendants, by their counsel, then and there excepted.)

Answer. I told him I understood his meat came in the same as the other meat from Des Moines, and Frank Murphey had charge of it, and I didn't know anything about it. As to the details of
43 this thing, I don't know anything particular about it.

Question. I will ask you to state while you were here, when this meat was coming from Des Moines; whether you had anything

to do with Killinger in connection with it; whether he gave you or your house any orders about it?

Ans. No. I saw Killinger in the office sometimes; I think after a part of this meat had been shipped. He came into the office and I was introduced to him. He inquired for Frank Murphey, but said very little to me about his business one way or the other. He inquired for Frank Murphey, and I guess he was told where he was. I think I saw him in the office 2 or 3 times. He never gave me any instructions about his meat when he was there. I don't know to whom he gave instructions with reference to his meat. He always called for Frank Murphey. He seemed to rely on him as having his business in charge; seemed to look to him. Frank Murphey at that time was a partner of Allins. That was what Frank told me. Him and Allin was in partnership in packing this meat, and the business then, all of it, was done by the partners.

Question. State whether or not you understood from Frank Murphey, or what you understood from him, with reference to the extent of that partnership with reference to this meat; how far it extended.

(Question objected to on the ground that it is not competent to prove the relation of partnership by the admissions or state-
44 ments of one of the alleged partners. Objection overruled by the court, and to the overruling of the court the defendants, by their counsel, excepted.)

Answer. My understanding was that Murphey and Allin packed the hogs. He was to send them here, and they was to be sold by B. F. Murphey. I understood he attended to that business for the firm here; that was my understanding at the time we made the arrangement with Frank. It was carried out so far as I know. No portion of the Des Moines pork was excepted from the arrangement; we were to have one per cent. on the amount, as I understood, of all the meat that came from Des Moines. Of the amount of sales we were to have one per cent. I had no understanding that any part of it was excepted previous to the time when Frank Murphy absconded.

Cross-examination.

Ques. You have assigned to yourself and to your son, L. E. Murphey, some duty in this firm, but leave out B. F.?

45 Ans. He was to attend to the Des Moines meat, and also make sales for our meat. He was considered the salesman of the concern for all meats that the concern had for sale; the general salesman. He was considered the salesman, and I think sold most of the meat; I sold some of it; I recollect selling 200 tierces of hams, and may be counselled with Frank about selling some of the meat.

Ques. That division of labor was not always lived up to?

Ans. I mean substantially that was the way we divided it; of course we all mixed up at some time; but that was the way we had it understood.

Ques. Do you know of the payment of any money by the firm to the plaintiff?

Ans. It will be heresay.

Ques. About what time was it; do you think that you saw Killinger in the office?

Ans. It was, I think, in the month of January, 1865; I won't be certain; I recollect very well he came in. I had heard about Killinger, about his operation, and had some curiosity to see him.

Ques. Didn't his name appear on the books of Miles Murphy & Co.?

Ans. I think the accounts of the Des Moines meat were all kept with each individually. Frank would come in and say, I have sold so much of this man's meat, and the book-keeper would put it down.

Ques. Mr. Killinger, one of the parties whose name appeared
46 on the books according to your recollection?

Ans. That was my understanding; I could not say I saw it; my understanding was, he was treated the same as any other man that packed at Des Moines.

Ques. In making these sales he was acting as a member of the firm of Miles Murphey & Co.?

Ans. He was a member of both firms—the way I understood it.

Ques. Where was the pork placed or stored?

Ans. In the packing house of Miles Humphrey & Co.

Ques. All the sales were on the books of Miles Murphey & Co.?

Ans. I guess our book-keeper did'nt open a new set of books; but the sales were all reported and went through our books, and was kept by our book-keeper; when B. F. Murphey made a sale, he reported it at the office.

Ques. Was he not acting as a member of a firm of Miles Murphey & Co.?

Ans. As I said before he was acting as a member of both firms.

Ques. In making these sales how was he acting?

Ans. In the first place, one of his agreements was, I expect to attend entirely to the business selling meat and transacting this business, and receiving it from Des Moines. Don't expect to give our company much trouble about it; it was my understanding he had charge of the Des Moines meat of which he was a member of the firm of Miles Murphey & Co. He had his $\frac{1}{4}$ of the profit of
47 one per cent. the same as the rest.

Ques. Did'nt he sell that Des Moines meat precisely as he sold any other meat that was in the house of Miles Murphy & Co., for sale?

Ans. Well he just went on and sold it; I think sometimes he would get orders from Allin and others to urge him to sell this particular meat he had in the house; and Barnes, I think, was there a good deal of the time. Barnes and somebody else were there looking after the interests of their meat, and I suppose giving directions about the sale of it; Frank had charge of it. I did'nt pay much attention to it. They were talking about it, and, of course, felt an interest in the sale of their meat.

Ques. Did the house of Miles Murphy & Co. ever make any advances on the Des Moines meat?

Ans. Nothing except freight; when we made the bargain with

Frank to receive the meat, he said [he said] we would have to advance the money to pay the freight on the Des Moines meat, until we could sell some of the stuff; we are not to make the advances, and he promised the freight should be paid out of the first sales of the Des Moines meat; we made no advances on the meat; nothing only on the freight. We paid some freight; a considerable amount, likely.

Re-direct examination.

Ques. I omitted to ask one question. State whether or not your house, Miles Murphy & Co., had any correspondence with Allen,
48 with respect to the Des Moines meat previous to the time when Frank Murphy absconded?

Ans. If it had, I don't know of any.

Ques. By whom was the correspondence had with Allen, if any person?

Ans. Frank Murphey, my understanding was, had the correspondence. Allen never wrote to our house with respect to the Des Moines meat that I know of; I don't know that he did. I could not say.

The plaintiff, further to sustain the issue on his part, was then offered as a witness on his own behalf, and being duly sworn, testified as follows:

49 Q. You are the plaintiff in this suit?

A. Yes, sir.

Q. Where do you reside?

A. Lancaster, Pa.

Q. Where did you reside in the fall of the year '64; and along through '65?

A. In the same place.

Q. What has your business been for some years before?

A. I have been dealing in fat cattle and hogs for the last 10 or 12 years.

Q. When did you make the acquaintance of the defendant, Allen?

A. In '61 or '62.

Q. State whether or not, during the fall of '64 you had a drove of hogs in the vicinity of Des Moines; and whether you had any conversation, or conversations with the defendant, Allen, with respect to these hogs; and if so, state all that was said and done between you and him.

A. I used to do my business at Allen's, I suppose for some 2 or 3 years. In the fall of '64 I was about Des Moines, maybe 10 or 12 miles, and put a drove of hogs on the road there and came down to Des Moines. The roads were very bad and rough, and it was hard driving to get along, and when I came down I went to Allen. I don't know whether I went there on business that day or not, I cannot tell; but I went up to the bank any way. He asked me what I was doing; I told him I was driving hogs. He said, "how are you getting along?" Says I, "pretty hard work to get along. "Well," says
50 he, "I suppose you pack your hogs here?" Says I, "I don't know about that; I don't know nothing about packing hogs."

"Well," says he, "we are packing a great many hogs for ourselves, me and Mr. B. F. Murphy, a partner of mine; and we are packing a great many for others, mentioning Barnes and Cook, Sherman and Hayes, and a man by the name of Sipher; and, says he, I think you will do better to [to] have them slaughtered here than to drive them to the railroad." I got to talking, and says I, "It might do better than driving." Says I, "I was never in the business, and don't know anything about it; I hardly would venture to go into it." Says he, "Mr. Sherman was in here yesterday, and figured here; and got a peice of paper and commenced figuring, and showed me the figures, and I figured over it and found if the thing would go that way I would do better than driving me hogs." The Chicago market was a little bad at the time and we talked that over; and says I, "It may be different by the time I get the stock to Chicago; sometimes the market is better when I get stock there than it was before, and at other times it may not be." I told him the hogs were coming in and I would see them the next day, and make up my mind; and, says I, "Mr. Allen, if I pack the hogs here and give them to your slaughtering establishment, I look to you to see me through, and pay me when the thing is through." Says he, "I will do that." I went away, and the next day went to the bank again. He asked me if the hogs
51 had come in; I told him they had not, but would come in to-day or in the morning. We talked the thing over about this hog business, and I told him I had'nt made my mind up to pack them yet. I did'nt know anything about it and never knew anything about it, and it was pretty risky business. Finally he spoke to me, and said he would like to have the slaughtering of them and handling of them, and there was a great many others slaughtering there, and he thought I had better. Says I, "I would'nt question that at all; but," says I, "I know nothing about it." "Well," says he, "I will slaughter them. I have a good partner at Chicago, A. F. Murphey, a good salesman; and," says he, "I will ship them to them; they will sell for me;" and says he, "any time your pork is at Chicago you can go there and see it sold, and draw your money any time you want it." Says I, "that will do very well;" and, says I, "I will make up my mind about it and go in." That evening one of the hands came and told me they were within 8 miles of the fort, that is Des Moines, this drove of hogs. The next morning I went to Allen, and told him me hogs would be in that day, and that I had partly made up my mind and would let him slaughter them, and says he; "that is right," and asked me how many I would have. I told him I had 260 odd in this drove, and there was a drove right behind this with over 400. The hogs came down, and we drove them down to the slaughter-house and counted them, and I went to the office and got a receipt for me hogs. I went back and sent
52 one of the hands back to meet this other drove, and in a day or two they came down; and Mr. Allen and I, having been together between the times, spoke about the hog business, the packing business; and says I, "I have 260 down there, and it is hardly worth the while to bother over it; and I believe when the other hogs come down I will drive them down too; when the other hogs come down I drove

them down too, and counted them, and went to the clerk and got a receipt for me hogs.

Q. How many hogs altogether?

A. 671 or 2 hogs. That was about from the 15th to the 25th of November, I think, as near as I can give the date.

By the court:

Q. Where are your receipts?

By Mr Roberts:

I will produce them.

Q. Look at the receipts now handed you, and state whether these are the receipts you got. (Handing witness 3 receipts, dated respectively, Nov. 23, 1864, Nov. 26, 1864, and Dec. 6, 1854.)

A. Yes, sir; those are the receipts.

Q. There are the true dates, are they?

A. Yes, sir.

Q. These receipts were given to you by whom?

A. By the clerk in the pork-house.

Q. At the time you delivered the hogs?

53 A. Yes, sir.

Q. Was Allen there?

A. No, sir, not at that time; but I think I met him on the road when we drove the hogs down.

Q. The first drove?

A. That I cannot remember, whether it was the first or second drove; there was a man at pork-house, probably the foreman there, and he counted the hogs and I told him, says I, "I would like to have a receipt for me hogs." Says he, "go in to the clerk, and he will give you a receipt, both times this man counted the hogs in the lot. I left and went back to the fort, and told Allen I had put the hogs there, some 670 head, and I started off up the country. I had bought a lot of hogs of Van Meeter, and on the 3rd of December put them on the road and drove them two days, and Mr. Rhino met me and I gave him over the hogs, some 550 odd head, and took one of my hands and went back and put a drove of cattle on the road, and went and got down to the fort. I suppose it was the 6th or 8th of December. I started the cattle away from there after the hogs, and got on my horse and rode down to the pork-house. When I got there I asked the foreman whether they had killed me hogs. He said, "yes; they were all killed," and took me into the pork-house and showed me the pork. I came back to Allen's and settled up what I had with him, and told him I had been to see me pork, and I said it was looking all

54 in good condition. He said it was Miller, the foreman; told him it was all in good condition. Says I, "Mr. Allen, I am going home;" and says I, "you handle this pork just the same as you would your own, and when the thing is at an end I want to settle with you, and look to you for my money." Says he, "I will." I started to come to Chicago and sold my stuff here on the 18th of December.

Q. How was your pork to be handled? what was to be done withit?

A. My pork was to be slaughtered and cured there the same as these other men's.

Q. Put into barrel-pork or bulk-meat?
A. Bulk meat.
Q. What was done with the lard?
A. That was to be rendered.
Q. How was that to be packed?
A. I remember I asked Allen what was the charges on those things.
Q. What was it to be packed in?
A. It was to be packed in tierces, in barrels; the same as their own and others.
Q. The lard was to be put up in tierces and the pork not to be packed?
A. No, sir.
Q. Not smoked?
A. No, sir.
Q. No smoking to be done?
55 A. I did'nt understand it then, and don't now. I asked him what the charges was; and says he this way, before I left I asked him what the cargo was; and says he, "We kill the hogs for the offal; we cut and salt them," I think he said, "for a cent a pound." I forget what he said for rendering the lard. Says I, "You will do mine the same as you everybody else's?" And says he, "Yes." Says I, "That is all I ask."
Q. What did he say to you with reference to Murphy being here, if anything, and what he was doing here?
A. He told me that B. F. Murphey was a partner of his, and he would ship the stuff to him, and he was a good salesman, and he would sell it any time I wanted it sold and pay me the money.
Q. Did you at that time know Murphy?
A. No, sir; never had seen him.
Q. Was anything said to you by Allen at that time about Miles Murphy and Co.?
A. Well, he did tell me that this B. F. Murphy was concerned with a good house here in Chicago, but I don't remember of his mentioning that firm at that time.
Q. He did'nt say, or did he say anything to you at that time about what he would charge for selling the pork here?
A. I don't remember that he did; but I think he said that they would sell it on as low terms as any other house; and told me at the time that this pork must go through some house at Chicago; and his partner was a good salesman, and their house had a good report,
56 and would probably get as much for the pork as any other house could get.
Q. Did you come to Chicago then?
A. Yes, sir.
Q. When?
A. I sold me stuff here in Chicago, hogs and cattle, the 18th of December, and then I left for home.
Q. When did you come back?
A. I came back the beginning of January, 1865.

Q. Where did you go and who did you see?

A. I came back with the intention of going to Iowa but stayed here in Chicago, the weather was very rough and bad, and I had several letters from there, Iowa, that I could'nt do anything and I stayed here and bought hogs and cattle here, and shipped to Philadelphia, Baltimore and New York. That was my business, what I did in Chicago.

Q. Did you see Frank Murphey while you were in Chicago?

A. I don't remember of seeing him until I went to his office.

Q. When was that?

A. Well, sometime in the beginning of January, about, maybe, the 8th or 10th or 12th, along there; I cannot remember the date exactly; I was at the Murpheys in the evening and Mr. Helin from Indianola saw me; I had frequently bought stock of him; and says he, "I have a drove of hogs that I want you to buy."

Q. You came back to Chicago after that stuff, and came
57 down here and found it was here, did you?

A. Yes, sir; found part of it was here.

Q. State what conversation you had with the defendant, Murphey, with respect to it at that time, and when that was.

A. Some time in January.

Q. '65?

A. '65. I got Ely Phillips, at the Fort Wayne yard, to drive me out to the pork-house. I asked him if he knew where Murphy's pork-house was. He said he did. I asked him if he knew B. F. Murphy. He said he did; had seen him at the yards frequently, but had no particular acquaintance. He had a horse and buggy; and says I, "Won't you drive me out there?" Says he, "Yes." We got in the buggy and went out. When we got to the pork-house, I think, I saw one of the hands, and asked him if any of the Murphys were about. They said they were, and went in, and one of the Murphys came out, and I asked him if he was B. F. Murphy. He said he was not; said his name was Leander Murphy. Says I, "Where can I find B. F.?" Says he, "If you go down to the office you can see him there." I asked Phillips if he would take me down. He said he would. We came down town to the office; and I asked him, in the first place, if he knew where the office was. He said he did. We
came down and went to the office and found Mr. B. F. Mur-
58 phy there. I asked him if he was B. F. Murphy. He said he was. Says I, "You are a partner of Allen's?" Says he, "Yes." Says I, "I have come here to see about some pork that has been slaughtered for me out there." He asked me what my name was, and I told him. I asked him if any of it had come in. He said, "Yes; your lard is all here and part of your product." Says he, "Pretty soon the whole of it will be in." I asked him then the price of lard, and he told me. I recollect he told me lard sold at 20 cents a pound, or a little more, and that it had come down some. I says, "Mr. Allen told me to come in here when the stuff was shipped here and see you about it any time I wanted to sell it; you would sell it for me and pay me the money." "Yes," he said, "that was

right." Says I, "If you can get 20 cents a pound for me lard, or anything over, exercise your judgment; and if you think it will run up, try and get me the best price." He said he would. I told him to sell whenever he could get 20 cents or over. Says I, "If you sell this stuff, deposit the money to Allen's credit, and when this is over I mean to settle with Allen;" and says he "That is all right." Says I, "In the meantime I will need some money, and Allen told me when the stuff was sold I should draw the money from you." "Yes," he says, "I had a letter from Allen telling me if he sold any of my stuff to my order he should pay the money on it, less the charges, the charges of slaughtering, shipping, &c." I left him then, and
59 in a day or two went there again. Before I got to the office that day, on the pavement I met Miles Murphy, and he told me, says he, "Frank sold your lard." Says I, "Yes." I walked and went up to the office, and when I got there Frank told me he had sold my lard. Says I, "What did you get?" Says he, "I got $21 62 a hundred." I think that is what he said. "But," says he, "I can't pay you the money on it; the man I sold it to hasn't paid the money." I said, "It don't matter for a day or two, although I could use the money." I asked if the pork was there. I don't remember whether he said it was all in or a part; I think he said it was not all in. I asked the price of pork, and he told me. Says I, "If there is a pretty good price for the pork that is in, and you can sell any of it, sell it." He said he would. "I expect to sell some of your pork, and will put yours in and sell it along with it." A few days after that he said to me, "I have got your money," and I think he sent the office boy out with a check on some bank to get $4,000. The boy came in with $4,000; a big bundle. I looked at it, and says I, "Frank, can't you give me any larger notes, this is pretty unhandy to carry this way." He said he thought he could, and he sent the office boy out again, and pretty soon he came and had a good deal of the money changed into the larger notes. I asked him what time he would go on 'change, and he told me. Says I, "Put this money into your safe until I come in and I will go on 'change."
60 He put the money in the safe, and him and I went on 'change. On 'change I asked him what pork was selling at. He told me what shoulders and sides and hams sold at. Says I, "That is a pretty good; this will let me out and make me a little money, and," says I, "I need money now, and I wish you would sell the pork as fast as you can." Says he, "Some of these days I will sell some of our own pork, and sell yours along with it." Says I, "Can't you sell me pork without?" He said he didn't know; he would try. Says I, "If I had pork enough to make a business of it to attend to it, I wouldn't mind; but I would like you to sell it." We came back together to the office; and at the office I made a calculation about the pork; and says I, "Mr. Murphy, if you would sell the pork, I would go out and make a little money." Says he, "I will try to sell it." We talked along, and finally I asked him for the money, and he opened the safe and gave me the $400, and I went off about my business.

Q. State whether or not, at that time, you gave him directions what to do with the money iu case he sold the pork?

A. Yes, sir. I told him then, "If it don't make any difference to you," says I, "I am doing business at the 5th National Bank, and if it don't make any difference to you, deposit me money in the 5th National Bank." He says, "I will do it."

Q. You had previously told him to deposit it to Allen's credit?

61 A. Before he had any of the stuff sold I told him that I intended to settle with Allen when the thing was through. When I drew the money on the lard I told him to deposit the money for me in the 5th National Bank to my own credit.

Q. Was the stuff all in then?

A. I cannot remember whether it was or not. I hardly think it was. I think he told me it was not all in.

Q. How long were you here at that time?

A. I was here from the beginning of January until about the 10th or 12th or 14th of March, '65.

Q. State whether or not you saw Allen during that time in Chicago, and about when; and if you had any conversation, and what it was.

A. I saw Allen one time. I went down town to see him; and as I was walking on the pavement somebody halloed to me, and I looked around and saw Allen and Murphy in a buggy.

Q. What Murphy?

A. B. F. Murphy and B. F. Allen. I walked out in the street and shook hands with them, and we spoke a few words, and they invited me to the office.

Q. When was that?

A. I think in February, '65, as near as I can remember.

Q. Was that before or after you got your money for your lard?

A. I think I had the $4,000 on my lard then.

Q. State any talk you had with Allen at that time.

A. I went into the office, and we got talking about pork.

62 They appeared very busy, all of them, settling up some accounts then, and Allen remarked to me, says he, "If we hadn't been so quick about shipping our pork from Des Moines I should have made a good thing out of it." Says I, "How so?" Says he, "There was a government man came up to buy pork," and says he, "I could have sold it at a good price, and would have sold him the whole ball of wax." He said he was very sorry there was any of it shipped, but it was not worth his while to bother with what was left.

Q. Wasn't worth the government agent's while?

A. Not worth the while to bother with it, there was not enough of it. I remarked with him I was sorry the man didn't go up there sooner. We spoke of other things. Mr. Allen was very busy with the men there in the office. I didn't pay much attention. I saw they were settling up something that day between them then, and I left.

Q. When did you leave to go away from Chicago?

A. In '65.

Q. Yes; after that?

A. I left between the 10th; well, perhaps between the 9th or 10th and 14th of March, 1865. I went to the office again and saw Frank Murphy, and asked him if he had sold any of me pork. He said he hadn't. "Now," says I, "Mr. Murphy, I am going home. I must go. I have business there that I must attend to; and if you will you sell my pork," says I, "you deposit the money to Mr. Allen's credit. Sometime after April—I can't get away from home
63 before—I will come out and settle with Allen." "Very well," he said, he would do it that way.

Q. Do you remember whether he stated at that time he had made any sale of shoulders to Bryor and Sanford?

A. No; I asked him if he had sold any of my pork, and he said he hadn't.

Q. State whether or not, during that time, you had any dealings Miles Murphy & Co., except Frank Murphy?

A. No, sir.

Q. Or any conversation with them in respect to your pork?

A. No, sir; never had a word with them about my pork. I might have asked them, when I came to the office and found Frank was not there, whether they knew whether any of it was sold, and I think he replied, "Why, no," or they "didn't know," or something like that. But I never asked them to sell any of it; never considered them in the transaction at all, whatever.

Q. When did you return to Chicago?

A. I returned to Chicago in June, '65.

Q. State what you did and said with reference to this matter with either of the [of the] defendants?

A. When I came back to Chicago, I went to the same office; and when I got there, I found Robert Murphy there, and asked him about my pork, and says he, "The thing is fizzled out."

(Objected to.)

Q. We don't want you to state any talk you had with Robert, unless Frank or Allen was present, but you can state any conversation you had with Frank Murphy at that time, if you had any.
64 A. Frank Murphy was not here when I came back from the east.

Q. He was not here?

A. No, sir.

Q. I will ask you to state generally whether or not you saw Allen at that time. Did you go to Des Moines, or what did you do?

A. I asked Robert to give me—

Q. You need not state that.

A. I started from here to Des Moines to see Allen. When I got there, I told him I came out to settle up this pork business.
65 Q. Go on and state all that was said and done.

A. I went to the bank to Mr. Allen, and told him I came out to settle up this pork business. He told me he didn't know

whether he had anything to settle with me. I asked him why not, and he told me that this man broke up in Chicago, and B. F. Murphy ran away with the money. I asked him, says I, "Didn't I give you my hogs to sell, and didn't you promise to put them through for me, and see me paid for them?" "Yes," said he, "but you went there, and ordered your pork sold." Says I, "I done it according to your instructions; you told me I sould go and have them sold there any time, and get my money." He says, "You told B. F. Murphy to deposit the money in the 5th National Bank, and that lets me out." Say I, "Mr. Allen, if that lets you out, the hogs are gone up the spout"—just so many words.

Q. State all the talk you had with him about it.

A. I told him, says I, "I understand you have settled with all these men that had their pork slaughtered and sent to Chicago, and sold there in the same way I have, and I understand you settled with them, and paid them all. And I look to you, and never did look to anybody but you, for the payment of my pork." Says he, "You told Murphy so and so, and that lets me out," he says. I tried to reason with him, but couldn't make anything out of him, and finally I asked him what he done with the grease. Says he, "I sold your grease." Say I, "What did it amount to?" He said, to $90 odd dollars. Say I, "Suppose you pay me that; that will pay me for coming out and back." Says he, "I will give you credit for that." I 66 then asked him for the abstract. I wanted to know how much pork was shipped, and asked him for it. Says he, "I haven't time to give it to you, but I will have one of the clerks make it out for you, and you come up after bank, and I will give it to you." I went after bank, and when I walked up Allen was away from the bank, across the street under a shady tree; it was a warm day in June—maybe towards the latter end. He was talking with a man, and I walked up and down the pavement until the man left, and we sat down on the curb, and we talked this thing over. I told him: say I, "Mr. Allen, I think you ought to settle with me and pay me my money." He says, "These men owe you the money." I said I hadn't anything to do with them; you are the man I contracted with, and depended on, and left everything to you." "Yes," he says, "but this thing telling Mr. Murphy to deposit this money in the 5th National Bank lets me out, and I can't do anything for you." He told me, I think, that Frank Murphy was down south; and he went down to see Frank Murphy who had taken some $20,000 and run away; and he followed him down there, and when he saw him, Frank offered this was the way. Says he, "Frank Murphy took off $20,000 of your money and mine, and run away, and I followed him down south, and found him there, and Frank, he thinks, is an honest man, and he said he would give him all the money; and he thought by giving him the money, he would try and make money to pay his debts. Say I, "Why didn't you ask for my money; and let him leave your money or give him more. I don't think it was right to let him have the money to speculate on." Well, he said he just let him have it; thought he needed it, and would make money out of it; said

67 he could make a heap of money by speculating in what I don't know. I think he said cotton.

Q. Did he furnish you the abstract you called for?

A. Yes, sir.

Q. Look at these. (Handing witness papers.)

A. These are the two papers he gave me at that time when we were down talking on the curb; he gave me these papers.

Q. State whether, while you were in Chicago at any time, you saw any of your pork here at the pork-house or elsewhere.

A. I never was in the pork-house. I drove up to it, but never was inside of it.

Q. State whether or not he made any demand of you for the money due for packing the pork.

A. No, sir.

Q. Made none?

A. No.

Q. These accounts he handed you at your request?

A. Yes, sir.

Q. State when you next saw Frank Murphy, where and what talk you had with him about this business.

A. I sold out my horse and buggy at Des Moines, and asked Allen when he would likely be in Chicago. He told me he was going to Chicago in 6 or 8 or 10 days; may be. Says I, "I have a little settling to do along the road, and by that time I will be there too. When I came to Chicago, I went back to the office again, and found Robert Murphy there, and asked him if Frank had got back.

68 Q. When was that?

A. When I returned, in June, back to Chicago.

Q. June, 1865?

A. Yes, sir; he told me that Frank had come back, and that Mr. Allen was in town at the same time. Says he, "If you sit down here a while Frank will be here." I sat down then, and Robert and I kept talking, and finally Frank appeared. Frank came to the office, and I asked him, "Well," says I, "Frank, I understand Frank is in town." "No," he said, "he was not." Says I, "I understood that Mr. Allen was here." "No," he said, "he was not here. Says I, "Mr. Murphy, I was out and saw Allen, and he told me he was coming in here, and I expected him by the time I got back, and I was told to-day Mr. Allen was in town." "No," he said he was not in. Says I, "at all events I want to see him, and said I wanted to fix up that pork business, and put it in a different shape from what it is now." Says I, "I need money before I go home, and I want you to raise me $3,000 on account, and the balance we can fix some other time." He seemed as if he was going to try to get me some money, and asked if $2,000 wouldn't do me. I said it would, if I can't get three, but I ought to have three. Says he, "I guess maybe I can raise you $2,000; come down to Mr. Jewett's, Mr. Allen's lawyer; he does all his business, and I think maybe we can get another thousand dollars. I went out to Mr. Jewett's, and when we got there, he related a part of this pork case to Mr. Jewett, and told him

I was here and wanted $3,000. Says he, "When Mr. Killinger was here at the office in the winter, he told me to deposit his money in the 5th National Bank," and he turned to me, and says he, "Didn't you, Killinger?" Says I, "Yes, I did." He turned back to Mr. Jewett, and says, "That would leave Allen out." Says I "Mr. Murphy, if that is all you wanted me to come here to answer you needn't have brought me here to commit myself. I don't deny that if that will let Mr. Allen out, the hogs are gone up." Finally we left, and I got no money. He said he had no money, and was down south speculating in cotton and lost it.

Q. What did he say about going to see Miles Murphy?

A. He finally told me to go and see him. Says I, "Frank, there is no use of my going to see him. I never recognized him in the transaction, and he will tell me at once that he owes me nothing; I can't claim off of him. Says he, "You go and see him." Says I, "You go with me; if you will go with me, I will go and see him; there is nothing like trying." No, he wouldn't go. Says I, "If you don't go, I won't go, for I don't know Miles Murphy from anybody else." He asked me where I stopped, and I told him, at the Matteson House. Says he, "I will come there with the horse and buggy, and take you down to the depot;" says he, "You go and see him." Says I, "If you will go with him, I'll go. He wouldn't go. Says I, "If you'll promise me you will stop in Chicago until I get back, I will go to satisfy you." Says he, "I will." He came to the Matteson House in the evening with his horse and buggy, and drove me to the depot. I went in and got me a pass to go and see him. I went down; got there in the morning about daylight; got my breakfast at the tavern, and after breakfast went up to see Mr. Murphy. When I got there, and told my story, and that Frank had sent me there, "Well," says he, "Mr. Killinger, you might have saved that. I haven't got any money. I don't consider I owe you." Says I, "That is what they say everywhere." Then Murphy told me of this contract they had with B. F. Murphy and Mr. Allen about this pork. "All we had to do with it was to let it go through our house and charge 2½ per cent.; give one and half, and keep one ourselves." That is all I learned going to see Mr. Murphy.

Q. Did you come back and see Frank Murphy?

A. I came back to see him; but when I got back, Robert told me he had left last night for the south, somewhere; I forgot where. I told Robert, said I—

(Objected to.)

A. I asked him where Frank lived, and he told me, and I went out to his him, and I asked his wife; saw his wife, and asked her.

Q. You needn't state that. Did you find out whether Allen had been in town?

A. I was told—

Objected to.)

Q. Did you ascertain the fact whether Allen was in the city?

A. Yes, sir.

Q. Was he?

71 A. Yes, sir.

Q. You didn't get to see him?

A. No, sir; B. F. Murphy kept him hid; he denied to me—

Q. Murphy denied that Allen was in town?

A. Yes, sir.

Q. Have you ever got anything from this pork, except the four thousand of the lard?

A. No, sir; never got a cent.

The plaintiff's counsel then offered and read to the jury, as further evidence, the receipts referred to and identified by the witness, as follows:

Received of Mr. D. Killinger two hundred and sixty-four live and one dead hog, for slaughtering and packing.

MURPHY & ALLEN.
pr. McVICKER.

DES MOINES, IOWA, *Nov.* 23*rd*, 1864.

Received of D. Killinger four hundred and four head of hogs for slaughtering and two dead hogs.

MURPHY & ALLEN.
p. McVICKER.

DES MOINES, IOWA, *Nov.* 26, 1864.

Received, Des Moines, Dec. 6, 1864, of T. J. Rine, 1 hog
72 for Mr. Killinger; gross weight, 244.

MURPHY & ALLEN.
pr. P. B. ORILL.

The plaintiff's counsel also offered in evidence and read to the jury the abstract and statement referred to and identified by the witness as follows:

Abstract of shipment of David Killinger's meat from Des Moines, Iowa, F. B. Murphy, of Chicago, Ill's.

Number of hogs	667
Number of shoulders	1332
Number of hams	1330
Number of sides	1315
Number of tierces of lard	62
Weight of meat	83,421
Weight of lard gross	18,800

David Killinger,
73 In acc t with Pork House of Murphey & Co., Dr.

Dec.	To rendering lard	$188 00
"	" " grease	5 72
"	" 40 bu. corn	35 00
"	" 62 tierces @ $3	186 00
"	" 2 grease bbls @ $3	6 00
"	" find hands for bulking	189 44
"	" salt 667 hogs @ 42½ cts	283 47
		$891 63

CR.

By 572 lbs. grease @ 16 cts.	$ 91 52	
" 1,908 lbs. sides at Chicago	267 12	
		358 64
To Balance		$532 99

Cross-examination.

74 Q. How long have you been in the cattle business and hog business?

A. Some ten or twelve years.

Q. In Iowa a part of time?

A. In Iowa. I suppose I was there four or five years back and forwards nearly all the time.

Q. In the fall of 1864?

A. I went there in 1861.

Q. In the course of business you got acquainted with Allen?

A. Yes. sir.

Q. Did you do business with him as a banker?

A. Yes, sir; I did some little business there.

Q. When you came into Des Moines in the fall, November, 1864, where did you first see Mr. Allen?

A. I think the first time was in the bank.

Q. Your hogs had not arrived at Des Moines at that time, as I understood you?

A. The first time I saw him you asked me.

Q. Yes, sir.

A. I saw him in his bank; I went there to get some money on a draft I had.

Q. Your hogs had not got to Des Moines?

A. That was maybe a year or two years before.

Q. I am referring to 1864.

A. No, sir; my hogs had not arrived.

75 Q. I am asking where you first saw him that fall, when you came there with your hogs.

A. I think, as near as I can remember, it was in his bank.

Q. How long after that first interview was it before your hogs arrived in Des Moines?

A. I suppose maybe two days, or two and a half; that is, the first drove.

Q. Did you know before this that Murphy & Allen had a packing-house, and were packing hogs at Des Moines?

A. I did not know who was concerned in the packing-house.

Q. You knew there was one there?

A. I knew there was one there. I knew Murphy and a man by the name of Goodwin packed there the year before; at least I saw Goodwin there, and heard the name of Murphy; but never had seen Murphy that I had any recollection of.

Q. You did not know Allen had anything to do with the packing-house until he told you this time?

A. I don't think I did.

Q. Had you been in Des Moines before that fall?

A. Yes, sir. I was there the fall before, and I suppose two falls before.

Q. Before this time, in the fall of 1854, had you been there?

A. I occasionally came through there, back and forwards; yes, sir.

Q. Did you see Allen, and have any conversation with him previous to this, in the fall of 1864.

A. I don't remember of having any conversation with Allen anywhere only at his bank.

76 Q. Had you seen him in the fall of 1864, before this time?

A. I would occasionally go to the bank and get some drafts done.

Q. Never had any conversation with him about packing hogs?

A. I don't think I had; I don't remember; I don't think I had.

Q. You state the weather was bad?

A. The weather was good, but the roads were very rough.

Q. Bad for driving hogs?

A. Pretty bad for getting along.

Q. The market was dull?

A. Yes, sir; but that did not make any difference.

Q. Did these considerations have no weight with you in ordering your hogs packed there?

A. The driving of them had; but the market did not.

Q. How long did you stay at Des Moines that time?

A. I suppose I was at Des Moines—well, those hogs I delivered at the slaughter-house about the 20th of November. The second drove I don't remember, only as I look at the receipts.

Q. How long did you remain there?

A. Well, a few days. I went up to Vanmeeter's, and weighed his hogs on the 3rd of December—five hundred and fifty odd hogs.

Q. Then you staid there until about the 5th of December?

A. I don't think I was there until the 5th; that is, until after I got back from Vanmeeter's. I suppose I started from the fort up to the 6th or 8th or 10th. I cannot tell.

77 Q. Of December?

A. Of December. I don't think it was as late as the 10th.

Q. When you left there your hogs had been slaughtered and cut up?

A. Yes, sir.

Q. The lard had been tried?

A. I don't think the lard was rendered.

Q. You saw your hogs after they were dressed and cut up?

A. I saw the meat piled up in the pork-house; but the lard I didn't see.

Q. Could you not have directed the shipment of your hogs from ——? Was it made any condition of your packing hogs there that you should ship them to Murphy?

A. How?

Q. Could you not have shipped your hogs, after they had been slaughtered, to another party than B. F. Murphy?

A. I suppose I could if I had insisted on it. I will tell you a little circumstance if I am allowed to do so.

Q. Confine yourself to my questions at present. By and by, if you want to explain, you can do so.

A. I suppose I could if I had insisted; but I didn't insist shipping any other way, and he was to do as he did with his own.

Q. That was about the arrangement?

A. Yes, sir.

Q. Did you go direct from there to Chicago?

A. Yes, sir.

Q. That would be about the 12th or 15th of December?

78 A. I came to Chicago. I must have come here the 17th or the 16th, I don't know which. I sold my stock in Chicago; I sold my hogs——

(Objected to.)

Q. No matter about that. Then you went on east?

A. Yes, sir.

Q. And came back in the early part of January?

A. In the beginning of January, 1865.

Q. Then is the time, if I understand you, that you enquired for B. F. Murphy?

A. Not directly when I came here.

Q. When you were here at that time?

A. Yes, sir.

Q. You went to the office to ascertain if a portion or all of your stuff had arrived?

A. And I ascertained my lard was here, and part of the pork.

Q. Whose office did you go to?

A. Frank Murphy's office.

Q. Did he have any sign over the door?

A. I think the sign read "Murphy & Co." I think that was all there was on the sign.

Q. And you went to the office of Murphy & Co. to find B. F. Murphy?

A. Yes, sir.

Q. Did you notice any sign on the packing-house when you went to the packing-house?

79 A. No, sir. It was a very stormy, blustering day, and I never got out of the buggy.

Q. At that time no part of your pork had been sold when you first enquired?

A. Not when I first enquired; there was none of it sold.

Q. How long after that was it before you enquired again, and found out a portion had been sold?

A. I enquired every week, or every few days, whether any of my pork had been sold.

Q. Can you state about the time when you found out a portion of your lard had been sold?

A. Somewhere in the latter part of January, I think, or directly the beginning of February, as near as I can recollect. I should rather think it was the latter end of January.

80 Q. It was about that time you got the $4,000?

A. It was the commencement of February, as near as I can recollect, when he paid me the $4,000.

Q. It was about that time, or a day or two after, that you directed the proceeds of the balance of your pork to be deposited in the 5th National Bank?

A. When I went to sell my lard I told him to deposit it to Allen's credit. When he paid me the $4,000, I told him if it made no difference he should deposit the money to my credit in the 5th National Bank when he sold the stuff; I thought it would be less trouble.

Q. Did he say it should be done so?

A. Yes, sir.

Q. You were here from that time forward until sometime in March?

A. Sometime in March.

Q. Urging the sale of your pork all this time occasionally?

A. I think I did, as near as I can recollect, tell Mr. Murphy pretty near every time I saw him to have the pork sold.

Q. Do you know whether the pork was being sold at that time?

A. Yes, sir; they were still selling pork. I asked him if it could be sold, and he said "Yes, it could." He said he would sell some of it with his. Says I, "Can't you sell mine alone?" "Well," he says, "there was not so much of it."

Q. Would sell better in bigger lots?

A. Yes, sir; or something like that.

Q. He thought it would sell better in bigger lots?

81 A. He kind of intimated there was not so much of it, and that it would be hard to sell such a quantity as that.

Q. You went back in March and didn't return here again until June?

A. I went home in March with the intention of coming back in the beginning of April. I went home between the 10th and the 14th of March, with the intention of coming back directly after the first of April, but could not get away from home until in June.

Q. Didn't get back here until June?

A. I didn't come back here until June.

Q. When you got here, B. F. Murphy was not here at that time?

A. No, sir; I don't know whether he was or not; at least I was told he was not.

Q. You spoke of having met Mr. Allen once in Chicago at the office.

A. Yes, sir.

Q. You say that he mentioned to you that he wished the pork hadn't been shipped at Des Moines?

A. He says, "If none of the pork had been shipped, he could have made a good sale of the product at Des Moines, and he was sorry any of it was shipped."

Q. For the reason there was a government agent there to purchase?

A. There was a government agent come up there, or had been, to buy Des Moines pork, and a good deal of it was shipped, and the balance of it that was there was not worth his while bothering with it. He wanted more than there was there; but if he hadn't shipped, he could have made a sale of it.

82 Q. If I understood you aright, you said Allen remarked if the pork had been there he [he] would have sold the [the] whole ball of wax?

A. Yes, sir.

Q. Are you sure of his using that expression?

A. Something like that; I think it was that. It was something material to that. I told him then I was sorry myself that the meat had not gone up there.

Q. You understood from him that there had been a government agent at Des Moines who would have bought the whole?

A. Either on the way coming up, or else up there to buy that stock. I don't know whether the man was on the road, or at the fort; but it strikes me the man was up at the fort.

Q. Not finding B. F. Murphy here, you went to Des Moines in June?

A. Yes, sir.

Q. And you saw Allen?

A. Yes, sir.

Q. Did I understand you to say he told you he had followed and found, and seen B. F. Murphy?

A. He told me he had saw B. F. Murphy since he ran away from Chicago.

Q. Did he tell you where he saw him?

A. I cannot remember where; but I think he saw him down south, but will not be positive about that.

Q. And he told you he had run away with his and your money?

A. Yes, sir; he says he took $20,000 of your and my money, and run away with it.

83 Q. You are certain about that, are you?

A. Yes, sir; I am.

Q. Did you ever pay anything towards the packing and curing of this meat?

A. No, sir.

Q. Nor towards the freights?

A. No, sir; there was nobody never asked me for anything.

To further support the issues on his behalf, plaintiff called Charles G. Cooley, who testified as follows, to wit:

84 Charles G. Cooley, called on behalf of the plaintiff, being duly sworn, was examined in chief by Mr. Roberts, and testified as follows:

Q. Where were you in business in the winter of 1864–'5, and summer of 1865?

A. From the first of March, during the year 1865, I was with Culbertson, Blair & Co.

Q. What was their business?

A. They were packers, and commission merchants also.

Q. State whether or not Culbertson, Blair & Co., during the year 1865, made a sale of any pork, and if the defendant, Allen, has had any connection with it. State all that he said and did with reference to it, so far as you know from having been present, and look at that account, (handing witness paper.)

A. Some time during the month of April, I think it was, we received a quantity of hams and sides; also, I believe they were taken from Miles Murphy & Co.'s packing-house and sold; the proceeds of it, most of it, was paid to the Merchants' National Bank, Chicago; the balance of it was paid to the Union National Bank for the credit of Mr. Allen, of Des Moines.

Q. How much of it was placed to the credit of Mr. Allen at the bank?

A. I have refreshed my memory from the books about it, (referring to books,) and know the proceeds of all the sales amounted to
85 $32,475 33. I paid to the Merchants' National Bank $23,022, and paid Mr. Allen $9,453 33 cents.

Q. By whose direction was this?

A. That was done by the order of Mr. Allen, I believe. It was an arrangement between Mr. Allen and Mr. Murphy, I believe.

Recalled.

Q. Mr. Robert Murphy?

A. Mr. Robert Murphy; yes, sir.

Q. Was you present, and heard the conversation with Allen in reference to this pork?

A. Yes, sir, I was present. After the pork was first taken possession at the request of the Merchant's National Bank, who held the receipt for it, if it was done before Allen came to Chicago. He came here and made the arrangement to have the proceeds disposed of.

Q. Who of your firm acted with reference to it with Allen and Robert Murphy?

A. Mr. Blair, I think, and Culburtson also. I think they were both there.

Q. You were holding the pork there for the Merchant's National Bank?

A. No, not holding it. The bank held the warehouse receipt as collateral security for some obligation; we acted as commission merchants for the bank.

Q. State whether or not your house received any letters from
86 Allen with respect to the pork, and look at those (handing witness letters?)

A. We received several, I suppose more than I have been able to find to-day. There is two I find here.

By the court:

State their dates.

A. One is dated May 22d, and the other the 3rd of June, 1865. I cannot tell what day they were received.

Q. Addressed to Culbertson, Blair & Co.?

A. Yes, sir.

Q. How was the account of this pork kept on the books—in whose name?

A. At first we did'nt keep—we kept it in the name of whoever it might concern; it was uncertain who it belonged to. The last account rendered, I think, was made to Allen. Some of the stuff had been sold to the government before it came into our hands, and had'nt been delivered, and was being smoked; hams, I think, it was; we attended to the delivering and collecting from the government for it.

The plaintiff then offered in evidence the letters referred to by the last witness, which are as follows:

87

BANKING HOUSE OF B. F. ALLEN,
Des Moines, May 22, 1865.

Mess. CULBERTSON, BLAIR & Co., *Chicago*:

Will you please send me statement of the sales of the stuff received by you from the pork-house of Miles Murphey & Co., and also of the hams delivered to the commissary. I have to settle with the parties here who owned the meats, and cannot settle until I get a statement. Please send it as soon as possible, and much obllge, yours, respectfully,

B. F. ALLEN.

BANKING HOUSE OF B. F. ALLEN,
Des Moines, June 3, 1865.

Mess. CULBERTSON, BLAIR & Co., *Chicago*:

Will you please send me statement of proceeds of the hams sold commissary, and received by you from Duffield & Co.

The reason I am such a hurry, is that they belonged to another party, and I cannot settle with them until I get account of sales, and they are asking me every day for a settlement, and I have been compelled to pay them on it, and am afraid I have paid them too
88 much, and they still want more. I hope therefore you can send it to me at one; and much oblige yours, truly.

B. F. ALLEN.

Cross-examination.

Q. Did you ever see the warehouse receipts upon which you say this pork was taken from Miles Murphy & Co.?

A. I don't think I ever saw it; I might have, but don't recollect.

Q. Do you know how it was delivered at the pork-house of Culbertson, Blair & Co. by whom?

A. I think we sent teams for it at the suggestion of the cashier of the Fifth National Bank.

Q. Do you know whether the meat Culbertson, Blair & Co. sold—I mean the lot in which Allen had an interest, and about which he was—consulted came from the packing-house of Miles Murphey & Co.?

A. I am of the impression it did not. I think it came from the smoke-house.

Q. Did'nt the larger portion of it come from the smoke-house?

A. I could'nt say what portion.

89 Q. You may be able to answer that by referring to memoranda taken from the books.

A. Yes, sir.

Q. These letters referred to a sale to the commissary?

A. I didn't notice them.

Q. They say by Culbertson, Blair & Co. to the commissary department of the government?

A. I cannot give the amount that was sold to the commissary. The amount sold to the government was 6,978, weighing 76,156 pounds, and we received $12,877 97.

Q, That was hams?

A. That was smoked hams.

Q. Part of that came from Bowen's smoke-house?

A. I think it did.

Q. The balance of it came from Murphy & Co's. packing-house?

A. I think it did.

Q. But you don't know that those hams were put in by Mr. Allen, or by Murphy & Allen upon the contract which Culbertson, Blair & Co. had with the government to fill the contract?

A. They were put in on a contract with an understanding between Murphy & Co., and Culbertson, Blair & Co. That is my impression. The contract under which they were delivered, I think, was made before I went with Culbertson, Blair & Co. Of that I am not certain, but I think it was.

90 Q. Did you see, in relation to this matter at all, C. B. Blair, president of the bank?

A. My impression is C. B. Blair was not at home. Mr. D. Koven was the cashier and did the business.

Q. Do you know whether this stuff from the packing-house was turned out to Mr. Blair, or to the Merchant's National Bank; or whether it was taken possession of by the bank without being turned out?

A. The cashier went with Mr. Blair and took pessession of it.

Q. Went and took possession of it with the warehouse receipts?

A. Yes, sir.

Q. You don't know whether there was anybody there to represent Miles Murphey & Co. in the turning out?

A. I cannot say. I didn't go with them, and cannot say who was there.

Q. These hams were not turned out in that way, were they, as you understood it?

A. I cannot say about that. I know hams came into our possession; but whether we held the warehouse receipts I don't know.

Q. Did they come at the same time with the others?

A. It occurred about the same time.

Q. Was it the same time? Have you anything which will show whether they came at the same time.

A. I think it was at the same time. I am under the impression it was about the same time.

Q. Is your recollection distinct about that?

A. I am quite positive it was all considered one transaction.

91 The hams were never taken to my house; were retained in the smoke-house until they were delivered to the government.

Q. What I wish to know is did the hams come with the balance of the stuff at the same time to Culbertson, Blair & Co's. packing-house?

A. I am of the impression the hams never were delivered to the packing-house.

Q. Were they immediately delivered on contract?

A. They were being smoked, and when fully cured were sent to the government.

Q. They were at the smoke-house when the other stuff was delivered?

A. That is my idea of it.

Q. These hams amounted to $12,000?

A. That was the gross amount. There was some charges and expenses of smoking.

Q. You paid some $23,000 and upwards of these gross proceeds to the Merchant's National Bank?

A. Yes, sir.

Q. Do you know how Culbertson, Blair & Co. got control of these hams? Did they or not have possession of any wharehouse receipts covering these smoked hams.

A. If they did they obtained it through the Merchant's National Bank.

Q. Will you be certain about it?

A. I won't be certain.

92 Q. The other warehouse receipts you know were from the National Bank?

A. Yes, I know they had one receipt.

Q. Will you recollect anything respecting that warehouse receipt covering the hams?

A. I never saw it that I know of. I was under the impression at the time that I didn't handle the meat. I made up the accounts, and I attended to the collecting and minutie of the business. I didn't make the sales, but was present when the sides were sold; but I was under the impression all in the same account.

Q. Because of that impression you rendered it all in the account?

A. Yes, sir.

Direct examination resumed.

Q. This account is made out in your handwriting from your books?

A. The original account was made, one of them in my writing, and the other was not.

Q. Are they correct copies?

A. It is copied by the present book-keeper.

Q. You didn't verify these by your books?
A. Only as I took the account from the books on a separate card.
Q. You didn't give the charges?
A. No.
93 Q. Your recollection is, as I understand you, that all this pork, including the hams, was arranged for by Mr. Allen and Robert Murphy?
A. I don't know of any separate lots of meat. We got it all about the same time. It occurred about the same time, and my impression was it was to go under the same arrangement.

Robert P. Murphy, called for the pl'tiff, being duly sworn, was examined in chief by Mr. Roberts, and testified as follows:
Q. You are a member of the firm of Miles Murphy & Co, and were in 1864?
A. Yes, sir.
Q. Who composed that firm?
A. Miles Murphy, Benjamin F. Murphy, myself, and L. E. Murphy.
Q. Who composed the firm of Murphy & Co. that was in existence at that time?
A. That was not in existence at that time; the affairs of that concern were not entirely wound up.
Q. Who composed the firm of Murphy & Co.?
A. The same persons were in it, although Miles Murphy
94 had no interest in it. He allowed the use of his name, but had no interest in it.
Q. What business was your house engaged in in the fall and winter of 1864 and 5?
A. In the pork-packing and commission business.
Q. Pork packing?
A. Yes, sir.
Q. Selling pork on commission also?
A. Yes.
Q. State whether or not your house had any bargain with the firm of Murphy & Allen—if there was such a firm—with reference to commissions on the sales of hogs that were to be shipped and put into your house for sale, the hog product.
A. We did.
Q. About when was that arrangement made, who were the parties, and on whose behalf was it made?
A. I can't recollect the exact date, but it was in November, or early in December; I think in November, 1864.
Q. Just state the substance, according to your recollection, of the conversation, and the terms of the agreement, whatever it was.
A. That arrangement was made by B. F. Murphy, of the firm of Murphy & Allen, on the one part, and myself and Miles Murphy, on the other.
Q. That came from Miles Murphy & Co.?
A. Yes, sir. The arrangement was about this: Mr. Murphy

stated that they were packing hogs, or were going to, in Des Moines, Iowa, for a Mr. Allen, and for themselves and sundry persons,
95 at that time. I don't know he knew just who they would be, but they would leave a large amount of stuff to ship to Chicago, and wanted some house to handle it here; and being a member of both firms, why he said it was his duty to drive as good a trade as he could in behalf of Murphy and Allen, and he proposed to give us one per cent. for handling the stuff, and actual charges; that is, packing-house charges, such as drayage, labor, salt, &c. Our commissions were to be one per cent. on all sales, and we were to charge up on the sales the regular commission of two and a half per cent., and credit back Murphy and Allen one and a half per cent. We demurred against the arrangement, but finally went into it with that agreement.

Q. State whether or not he said anything about putting it into some other house if you didn't agree?

A. He said he could get it done by other houses at that price, but he would sooner give our house the preference than to put it into another house.

Q. Was that pork subsequently shipped?

A. From Des Moines?

Q. Yes.

A. Yes, sir.

Q. To your house?

A. Yes, sir.

Q. To whom was that pork sent?

A. To B. F. Murphy.

96 Q. State, if you please, whether previous to the time when B. F. Murphy left—which I believe is agreed upon to have been some time in April—what time was that?

A. The tenth of April.

Q. State whether previous to that time anything had been said to you by B. F. Murphy, or Allen, that that pork of Killinger's was to be excepted from this arrangement?

A. I din't know any difference in it at all.

Q. With whom was the correspondence with reference to the Des Moines pork with Allen? With whom did he correspond?

A. I think Allen's correspondence was with B. F. Murphy. He may have written our firm a letter, but I don't recollect of seeing it. I think his correspondence was with B. F. Murphy exclusively.

Q. State whether you ever had any contract with Killinger with reference to this pork?

A. We had not. I didn't know there was such a man at the time.

Q. State whether or not you had any arrangement with any other person or persons than Murphy & Allen, with reference to this Des Moines pork.

A. None whatever. There was several of those parties here during the time we were selling the meat.

Q. I asked with reference to that. All these parties were down here while this meat was being sold?

A. I think probable they were all here.

Q. Can you mention their names?

97 A. Mr. Barnes and Cook, of the firm of Barnes and Cook, Hoyt and Sherman, Sipher, Hayes; I don't know whether he was here or not; he might have been; but I don't recollect.

Q. What were they doing here?

A. I don't know I could tell exactly what they were doing.

Q. They were about your establishment?

A. Yes, sir.

Q. They were during the time the pork was being sold?

A. Yes.

Q. At and in your place. Do you remember whether any of them got any money of your house while the pork was being sold?

A. I think they did.

Q. Do you remember of Sypher getting any?

A. I have no recollection; I was not about the office myself; I could only state by referring to the books.

Q. The books would show?

A. Yes, sir.

Q. State how the accounts were kept on your books; how you designated the meat of different parties, as it was shipped.

A. It was designated by the way-bills as it came in—as I understand it—the way the meat was shipped. In fact, I am very positive it was shipped to B. F. Murphy, for the account of different persons—account of Killinger, account of Barnes & Cook, &c—and we kept the meat separate at the packing-house in different lots.

Q. So you would know what to charge against each man for

98 commissions?

A. Yes, sir.

Q. State whether you kept an account separate on your books of these different parties?

A. I think the most of them was.

Q. Did you or not have a settlement with any of these parties previous to the time Frank Murphy absconded?

A. I don't think there was any final settlement with any of them, not previous to his going away; I don't know there was afterwards; I don't know who settled with them.

Q. State whether or not Allen settled with them, if anybody?

A. I don't know anything about that; we made up statements and sent them to Des Moines, or gave them to Mr. Allen, I don't know which.

Q. State whether Allen came around here, in January or February, while the pork was being received?

A. Mr. Allen was here during the winter, I think, frequently; at least he was here; I don't know how often.

Q. Was there any conversation with reference to these commissions?

A. I don't know; I don't know whether he had any conversation on that subject.

Q. Who paid the freight on this pork as it was being received?

A. Miles Murphy & Co.

Q. To whom did you charge it?

99 A. Charged it to Murphy and Allen.

Q. On all this pork from Des Moines?

A. It came in mixed up in such a shape it was impossible for us to tell how it should be charged to each separate lot, and I think, at the suggestion of B. F. Murphy, the freight was all charged to Murphy and Allen's account; and by common consent, while the stuff was all received, we would pro rata each lot; we could tell how many pounds each man had, and what the whole freight was.

Q. You charged it entirely to Murphy and Allen?

A. Yes, sir.

Q. How much did that freight amount to on all the Des Moines pork?

A. I couldn't tell exactly; could tell from the books by going over the account.

Q. You couldn't tell in round numbers?

A. No; I couldn't approximate.

Q. Look at the account, and see if it is correctly taken from your books; of the disposition of the pork of Mr. Killinger, the plt'ff, (handing statement to witness?)

A. That is the account, I think, as it now stands.

Q. As it now stands on the books?

A. Yes, sir.

Q. Will you look at the items there, on the date of 20 "April," to Murphy and Allen, seven hundred hams, eleven hundred and seventy dollars, and state what you know about these hams, and also on the two items of hams and sides, 50 and 53?

100 A. The seven hundred hams, and fifty sour hams, was a lot of hams that Mr. Murphy sold to government; he put in a bid to government, and received a contract for a certain amount of meat; I don't think Murphy and Allen had enough hams to fill the contract of their own meat, and they took these hams of Killinger, at the market price, whatever it was at the time, on that contract.

Q. Was that previous to the 20th? Do you remember when they got the hams?

A. I don't know what time the contract was made; the account was not made up until after Culbertson and Blair made their statement.

Q. About what time, according to your best recollection, was it these 700 hams and the 50 sour hams—they were included?

A. Yes, sir.

Q. And was taken by Murphy and Allen on the contract?

A. It was about the 1st of April; probably the latter part of March.

Q, That was a contract Murphy and Allen had?

A. I don't know whose the contract was; my impression is that it was a contract that Culbertson and Blair had.

Q. Murphy and Allen were to help fill it?

101 A. B. F. Murphy had agreed to put in a certain proportion of the stock in case they got the contract.

Q. On whose behalf?

A. I don't know whether on behalf of Miles Murphy & Co., or Murphy and Allen.

Q. How is it charged on the books? Here it it: "'Murphy and Allen, 700 hams?"'

A. They received this amount of Killinger, and they got the benefit of the whole sale.

Q. Murphy and Allen?

A. Yes, sir.

Q. How was it about the 53 sides; were these got?

A. I should think, by referring to the books.

Q. Refer to the books with reference to those.

A. I see the 53 sides was a sale Murphy made, of a lot of stuff of Murphy and Allen's; they sold a lot of stuff Prior and Sandford had in November to fill a contract, and took 53 sides of Killinger, (referring to the books,)

Q. What is the date of the sale?

A. I don't know just what time the sale was made; the account commences in the packing-house; I think it is under the date of the 20th, but they were sold prior to that; I don't know just what date it was.

Q. Was the account of Barnes and Cook and Killinger kept separate on your books?

102 A. Yes, sir.

Q. Why were they so kept?

A. I cannot tell; only it was to designate each lot of stuff; in fact, I was not at the office.

Q. Who was the book-keeper?

A. Mr. Hughes.

Q. Where is he?

A. In New York.

Q. You state that Mr. Frank Murphy left about the 10th?

A. The 10th of April.

Q. Did Allen come here about that time, or when?

A. Allen came here a few days afterwards, probably 2 or 3 days.

Q. At that time, where was the pork that had been in the pork house? what was remaining unsold?

A. It was in the pork-house.

Q. Still at your pork-house?

A. Yes, sir.

Q. Hadn't it been taken by Culbertson and Blair?

A. Not when he left.

Q. State whether B. F. Murphy had made a sale to Prior and Sandford about the time he left?

A. Yes, sir.

Q. I see there is a sale of 940 sides of Killinger's; did it include the other pork?

A. I think it included 100,000 sides.

Q. That was sold to him previous to his going away; did

103 he get the money?

A. No, sir.

Q. Was or was not the pork delivered to Pryor & Sandford before Frank Murphy left?

A. No, sir; it was not.

Q. That pork went into the pork-house of Culbertson, Blair & Co?

A. Yes, sir; all the meat in the house went there.

Q. There was about 940 of Killinger's remaining unsold?

A. Yes, sir.

Q. He had nothing else remaining unsold but the sides?

A. I think not.

Q. By what arrangement did Culbertson & Blair have this pork?

A. When Murphy went away, the 10th of April, we found out we was in a pretty bad fix, and we went around to see some of our creditors, and amongst those was Merchants' National Bank. We owed them $23,000. We stated to them candidly just what our condition was so far as we knew it at the time; we did'nt know ourselves. We was in a bad shape. DeKooven suggested he had some warehouse receipts for pork at the house, and wanted to know if he could'nt get his pork. I told him we had sold, or Frank had before he left, 100,000 sides to Pryor & Sandford. If I could get Sand-
104 ford to take the sides before it got noised around, and pay us for them, I would hand the money over to him. I went to Sandford and insisted he should receive them and pay us the money. He said he had'nt the money, but had bought them for St. Louis parties, and he would wait until the money came by express, and would go and see Coolbaugh and get an advance. He went so see him, and told him what he wanted of the money, and then, as he informed us, Coolbaugh told him had better not.

(Objected to.)

A. We did'nt get any money.

Q. He did'nt get the pork?

A. No, sir.

Q. You delivered the pork as these warehouse receipts called for?

A. I don't think Mr. Blair had receipts to cover all the pork in the house. He had sundry receipts. In fact, I don't know what they did cover—anything about it. We turned out all the pork in the house upon his order.

Q. Had Allen got there?

A. I think not.

Q. How long before he did?

A. Probably the next day.

Q. State what he did and said with reference to it when he came?

105 A. When Allen came here he insisted that the meat belonged to him, and that B. F. Murphy had left and taken moneys that belonged to him, and left him largely in the arrears. We claimad, according to our books, Allen owed us then some 12 or $13,000, and we hold enough of the meat to pay that 12 or $13,000. Allen threatened to replevin the meat at one time.

Q. This was all Des Moines pork?

A. Yes, sir.

Q. Was there any other pork than the Des Moines pork?

A. No, sir.

Q. How was it finally settled up?

A. We finally compromised the thing by turning over the meat to Allen, all the meat we turned to Culbertson, Blair & Co. We told him he could do as he pleased with the meat, provided he would pay the Merchants' National Bank, the $23,000 we then owed them, and the balance of it would pay his debt, and we would give him the use of some securities we proposed giving which we had transferred to him.

Q. Did that arrangement include the hams in Duffield's smoking-house?

A. My impression is the hams at the Duffield smoking-house Allen already had the receipt for.

Q. Where did he get it?

106 A. I presume from B. F. Murphy.

Q. These 700 hams of Killinger's were up there being smoked?

A. Yes, sir; there was quite a lot of hams there—other hams beside these; some $12,000 worth of meat. We held the receipts for some of it, but had nothing to do with it.

Q. Allen, however, got hold of the receipts either from B. F. Murphy, or some other way?

A. I don't know. I know we had nothing to do with it.

Q. Do you know who got the receipts?

A. Only from hearsay.

Q. Did you make any settlement with Allen with reference to these commissions on all this Des Moines pork?

A. I don't know [know] whether we did just at that time; if we did'nt, we did shortly afterwards.

Q. How long was he here at that time?

A. I should think a week; probably more, and probably less.

Q. Do you remember whether it was during that subsequent visit you made that settlement with reference to this Des Moines pork, or at a subsequent visit?

A. I think it was at that time.

Q. State wether or not, you had any conversation with him with reference to these commissions?

A. We did; we posted up to his credit some $2,800.

107 Q. On this Des Moines pork?

A. Yes, sir.

Q. Was that new arrangement made with B. F. Murphy for 2½ per cent.

A. Yes, sir; we charged 2½ per cent. charged upon the account, and credited back, Allen and Murphy 1½ per cent., amounting to $2,800.

Q. When was that?

A. That was, I think, about the time Allen was here, some time in April.

Q. '65?

A. Yes, sir.

Q. He declined to take commissions on Killinger's hogs?

A. Yes, sir.

Q. Did he do it on all the rest?

A. Yes; we credited him up commissions on all the rest, except Killinger's.

Q. State what you said to him with reference to the commissions on Killinger's pork at that time, if any thing.

A. Allen stated, in so many words, he hadn't any thing to do with the Killinger account; that was a matter we could settle with him.

108 Q. What did you say to him?

A. I told him we didn't know there was no difference in the accounts at all. I didn't know Killinger's was different from any of the rest of them. We were not very particular who we had to pay it to; that was a matter for him and Killinger to settle.

Q. He declined to receive any credit for commissions on the Killinger's pork.

A. Yes, sir; he declined to have anything to do with the Killinger account.

Q. That was after your partner had absconded?

A. Yes, sir.

A. After your house had failed?

A. Yes, sir.

Q. Did he know the conditions pecuniarily of your house at that time?

A. I suppose he did.

Q. Look at your books and see if you paid any money during January, February, or March, to Sipher or Sherman, Barnes and Cook?

A. I see in Barnes's account we paid him one hundred dollars on April 3rd; April 4th, paid him fifty dollars.

Q. It is charged up in his account?

A. Yes, sir.

Q. Look at the Sipher's account.

A. We had also retained money on Barnes's account for
109 some losses. We had bought some corn for him to be delivered in May, on which there would probably be a loss, and we had retained the money.

Q. How much?

A. About four thousand dollars, I think.

Q. Out of the proceeds of this pork?

A. Yes, sir; we had retained it.

Q. At his request?

A. At his request or their own suggestion. We suggested that the account had to be kept good, and we retained money to make the contract good.

Q. Did you have any talk with Allen about that four thousand dollars?

A. I have no recollection of it; I might have had it.

Q. How much did you pay Sipher?

A. I didn't pay him anything.

Q. Hoyt, Sherman—Sherman and Hays?

A. No.

Q. Were those parties there during the time the pork was being sold?

A. They were here after the pork was received here. I don't know whether we were selling just at the time they were here; some of them were.

Q. Did you not give these shipping and way-bills to Allen with reference to settling with the railroad companies these freights?

110 A. Yes, sir.

Q. He got them all?

A. Yes, sir.

Q. What for?

A. They claimed to have a contract with the railroad company at a certain rate of freight.

Q. Who claimed?

A. Murphy. They had a special contract with the railroad company with regard to freight; and at their instigation or suggestion we handed the bills over to them, so that they could get the thing fixed.

Q. Did you know whether he did settle it?

A. I do not.

Q. Have you ever settled with Barnes and Sipher and Sherman or Hays, or any of the Des Moines men?

A. We settled the account with Mr. Allen.

Q. State whether or not he assumed those accounts.

A. Yes, sir; they all run through his account.

Q. Except Killinger's?

A. Yes, sir.

Q. Did your house receive any information from Allen or anybody else previous to the time Frank left in reference to whether this pork was to be received on any other terms than the other Des Moines pork?

A. I had no knowledge.

Q. If your house had received any, would you have been likely to have known it?

A. I think I should.

Q. Who sold this Des Moines pork in your house previous to the time when Frank Murphy went away?

A. I think B. F. Murphy sold it all.

Q. I wish you to look at your account with Murphy and Allen, under date of April 4th, 1865, and see whether there is an item of five thousand six hundred dollars and one eighty-two cents, ($5,600 82.)

A. And charged against him?

Q. Yes, sir; to Allen, so much money.

A. It is charged to B. F. Allen direct.

Q. I will ask you to state whether that sum of $560 82 was deposited to Allen's credit?

A. I see the sale is composed of 26,787 lbs. of sides belonging to Murphy and Allen; 4,256 lbs. belonging to G. Harland; 8,970 lbs. belonging to Killinger.

Q. Pounds of what?

A. Of sides.

Q. How much did this 8,970 lbs. amount to?

A. $1,255 80.

Q. You found the whole amount was deposited to Allen's credit?

A. I see on the opposite page of this cash book B. F. Allen charged for B. F. Murphy, $5,601 82.

Q. This corresponds with the amount and date?

A. Yes, sir.

111 Q. The sale to J. W. Finley, on the 4th of April, amounts to $5,601 82?

A. Yes, sir.

Q. On the same day there was a deposit or charge to Allen of so much cash paid to him, $5,601 82?

A. Yes, sir.

Q. Of which sum, $1,265 80 was Killinger's pork?

A. Yes, sir.

Q. Do you know anything about whether, as the Des Moines pork was being sold, it was deposited to Allen's account in the bank?

A. I don't know about that, it was charged up to him on the books.

Q. As the money was deposited it was charged to him?

A. Yes, sir.

Q. You didn't make the deposits?

A. No, sir.

Cross-examination.

By Mr. Jewett:

Q. You state, as a part of your examination, that you did not know such a man as Killinger; at what time do you refer to as not knowing such a man? You have known him some time.

A. When we made this arrangement about this contract for the handling of this Des Moines stuff.

Q. Did not know anything about Killinger then?

112 A. No, sir.

Q. Did you know anything about other parties which might be transacting business through Allen or the Des Moines pork-house?

A. No, sir; only B. F. Murphy stated that sundry persons were going to pack with them.

Q. You did not know the particular persons at Des Moines?

A. No, sir.

Q. You learned it only so far as you learned by the way-bills and the accounts, as they came into the office?

A. That is all.

Q. You knew there was such a man as Killinger as soon as this meat began to come into your house?

A. Yes, sir.

Q. And his name went on your books as the owner of meat?

A. Yes, sir.

Q. Was it not your understanding from Murphy that the proceeds of the Des Moines stuff were to be deposited to Allen's credit in the Union National Bank?

A. I had that from B. F. Murphy.

Q. You had that understanding of the business?

A. The understanding I had from B. F. Murphy was, that there was certain moneys that Allens had advanced out there, and those amounts was to be deposited there; and so far as paying the different parties any amounts, Mr. Allen informed Murphy from time to time what amount he could pay them, and the balance was subject
113 to his own order. That was my understanding as to it from B. F. Murphy.

Q. Did you have any instructions from Allen to the contrary of that general understanding of this from B. F. Murphy, as to the way in which the proceeds of the sales of the Des Moines stuff was to be disposed of?

A. We had no instructions from Allen whatever.

Q. Do you know whether those moneys which you say were paid Barnes—this same money which you state you retained, was paid and retained with Allen's knowledge—do you know whether Allen knew anything about it?

A. Only from Murphy.

Q. You had no communication with Allen about it all.

A. No, sir.

Q. Was ever any of the proceeds of the sale of the Killinger meat deposited to the credit of Allen any where to your knowledge?

A. I can only refer to the books here.

Q. Except so far as you know it from the books—I mean independent of that—do you know of the proceeds of that meat having been deposited to Allen's credit?

A. I have no recollection of it. It is so long ago, and I was not about the office very much.

Q. You say there was several Des Moines parties here.
114 Did they undertake to control the sale of their stuff?

A. I think they did. I think it was subject to their own wishes, as to the time and price.

Q. Do you know that, or is it your understanding?

A. I am quite positive that was the case.

Q. Do you know that they gave any orders or directions?

A. I think they did, that is my recollection.

Q. Which ones of them?

A. Well, Mr. Barnes was here more than any of the others; he was here a good portion of the winter, and Cook was here a portion of the time, but Barnes more particularly.

Q. Did you have any conversation with Allen, or hear from him what his relations to these parties were in respect to this pork?

A. I learned from Allen when he came here, about March or April, he had advanced these parties out there moneys. That was my understanding before, but not from him directly.

Q. That one single case is the only one in which you advanced or paid out any money to any of these parties which appeared on the books as the shippers of this meat?

A. Which one case?

Q. Barnes—the ones of the Des Moines parties—and is he the only one to whom you paid directly?

A. I think he is.

Q. You say you did'nt settle personally with any of these parties.

A. I think there was some of them here when we were
115 making up the accounts.

Q. You did'nt settle the accounts with them personally?

A. No, sir.

Q. All of your settlements were made with Allen?

A. Some of them demurred against the charges on the accounts; we told them we had'nt anything to do with that at all; that was only carrying out our agreement with B. F. Murphy and Allen.

Q. Was this when Allen was here these parties were objecting?

A. I think not.

Q. You think Mr. Allen was not here at the time.

A. I don't think any of them were here while he was here at that time.

Q. They objected to this settlement?

A. Yes, sir; they objected to the charges.

Q. In what respect?

A. That they were too high.

Q. What were the charges they objected to?

A. We had 2½ per cent. commission on the amount and actual expenses, and some of them thought where they had charged 2½ per cent. commission we had'nt ought to charge any commission.

Q. Was that or not usual in the business?

A. They referred that matter to some other houses here, and I think some of the other houses decided it was not usual, where they were getting 2½ per cent. they stored it a certain time free.

116 Q. You say they objected to the commission and some other charges.

A. They thought we should charge but 2½ per cent. on the account; we had'nt ought to charge storage.

Q. Was or not the 2½ per cent. the usual commission?

A. Yes, sir.

Q. Do you know whether or not it is usual for the commission houses to make a rebate of commissions to large shippers from the country, whether they are in the habit of doing it?

A. It is done sometimes.

Q. It is done?

A. Yes, sir.

Q. Do you know whether it is not usual for railroad companies to make a rebate upon their tariffs to large shippers?

A. Yes, sir; especially if there are competing lines.

Q. There is considerable competition in Chicago, is there not, in commission business?

A. Yes, sir.

Q. You say you don't know Allen knew about this arrangement about the commissions?

A. When the contract was made?

Q. He was not here.

A. No, sir; he was passing through here, and may have known it.

Q. You say at the time Mr. Allen came here and had a
117 claim against him of some $12,000?

A. Yes, sir. I don't recollect just the amount, 13 or $14,000.

Q. What was that made up of?

A. Made up in the way of advances. There was a running account, and oftentimes we owed him and he us.

Q. Advances in what way?

A. Cash.

Q. For what purpose?

A. The way that $12,000 matter originated just at that particular time, we had given him a mortgage on our packing-house for $20,000 and charged him with that.

Q. Did Allen at the time know of the mortgage?

A. I don't know; we had executed a mortgage and handed it over to B. F. Murphy. I don't think Allen was here. B. F. Murphy also represented to us he was acting as Allen's agent, and had proposed to us if we would execute this mortgage, Allen would advance us the money on it, which we did.

Q. And charged that up to him, which left his balance of some $12,000?

A. Yes, sir.

Q. If that mortgage and note had'nt been charged up to him, would you have been owing Allen what you do?

A. Yes, sir.

Q. When were those accounts that you have referred to
118 made up finally?

A. For the different parties?

Q. No, these entries on the books here.

A. During the month of April.

Q. When were the transactions to which they purport to relate actually made?

A. Most of them were made prior to B. F. Murphy's leaving.

Q. Were not those entries made some time subsequent to his going away? These closing entries covering the Pryor & Sanford and Culbertson & Blair operations?

A. They were made after he left.

Q. Was there not, at that time, considerable degree of confusion in your business matters?

A. Very great.

Q. Did you not find it difficult to arrange satisfactorily, and make the record complete, of the pork transaction of the firm?

A. We did.

Q. Did you have anything to do personally with the delivery of meat from the pork-house?

A. At what time? I don't know I had anything to do with delivery at any time.

Q. From March down to April.

A. I didn't stay at the packing-house.

Q. You hadn't anything to do with the delivery of meat from the packing-house?

A. I think not.

119 Q. Your knowledge is derived simply from the books, is it not?

A. Yes, sir.

Q. You don't know whether this sale to Prior & Sanford included the 700 hams and 50 sour hams and 53 sides of Killinger's meat or not, personally?

A. We have it on the books. Mr. Murphy always reported the things at the office, and the book-keeper kept the record of the things.

Q. You don't know personally about it any further than what the books show?

A. No; I think not.

Q. Do you know anything about this sale of Killinger's; what meat was delivered to him upon that sale, personally?

A. I don't think I was in the city. I think I was east at the time.

Q. You don't know of your own knowledge any of the Killinger meat was in that sale?

A. I have it only from the records.

Q. You don't know of your own knowledge?

A. No, sir; I don't.

Q. You say the sale to Prior & Sanford included 940 sides of Killinger's meat, as the books show?

A. Yes, sir.

Q. But that never was delivered, as I understand you?

120 A. I think Allen finally delivered the meat to Prior and Sanford, and carried out that sale.

Q. Do you know that?

A. Yes, sir.

Q. Didn't it go to Culbertson & Blair, on the warehouse receipts?

A. Culbertson & Blair delivered it to Prior & Sanford.

Q. Was it not taken possession of by the Merchants' National Bank, under the warehouse receipts which they held?

A. There was a little confusion just at that time. We turned out everything in the house, and they held receipts that represented a portion of it. What amount I don't know.

Q. Don't you know Blair claimed that he hadn't enough to cover his warehouse receipts.

I think he did.

Q. Do you remember now whether you examined the warehouse receipts, when you took them up, to see whether or not he had enough to fill them?

A. I don't know that I saw them at all.
Q. You saw them after they were delivered up?
A. I think he delivered a portion of them to Allen.
Q. Didn't they all come into your hands?
A. I don't recollect whether they did or not.
Q. Did or did not the meat that the Merchants' National Bank got possession of under these warehouse receipts go to pay the debts of your firm to the Merchants' National Bank?

A. I don't know anything about it. I know Allen agreed
121 to pay that debt, and we turned over the meat to him.

Q. Don't you know it was larger than the value of the meat which Mr. Blair got in the warehouse receipts?
A. Yes, sir.
Q. Then what Blair got upon his warehouse receipts didn't pay your debt to the bank?
A. I think it lacked some $2,500. I think the meat amounted to some $20,000, and the note was some $25,000.
Q. Do you know how that balance was paid?
A. I don't.
Q. Then after that was done, you credited up to Allen on the books the amount of the Blair note on the Merchants' National Bank note?
A. Yes, sir.
Q. And charged him, for the purpose of settling your books, with everything that Blair had in his hands?
A. I don't recollect how that was arranged. I should think that was the way it was done.
Q. Was or was not, according to your recollection, that the way in which the transaction was closed on your books?
A. I think it was.
Q. You say Allen assumed the settlement, the Des Moines accounts, except Killinger's.
A. Yes, sir.
Q. You say B. F. Murphy sold all the Des Moines stuff. Was he not generally the salesman of the concern?

122 A. Yes, sir.

Q. He sold other consignments as well as this?
A. He was the general salesman, and that was his portion of the business.
Q. On the 14th of April you have charged Allen $5,601 82· do you know whether he ever got that money or not?
A. I know B. F. Murphey got it.
Q. Do you know Allen got it?

By Mr. Roberts:
What was your answer?

A. I know B. F. Murphy got it, and I know it was my understanding that B. F. Murphy deposited the money at Coolbaugh's to Allen's credit.
Q. Was there any other Des Moines stuff that was turned out

upon these warehouse receipts to the Merchants' National Bank, except Killinger's.

A. I couldn't answer now. I didn't know at the time we turned it out. I didn't know whose it was myself. I know there was considerable confusion, and it was some time before we could get the accounts straightened out, and I have forgotten now.

Q. Did you, at the time Allen was here, make any final settlement with him, in April, or shortly after?

A. No, sir.

Q. You then concluded you owed him, and gave him a note, which was supposed to be sufficient to cover all deficiencies?

123 A. Yes, sir.

Q. Without having arrived at a definite amount?

A. Yes, sir.

Q. How much was that note?

A. $10,000.

Q. Wasn't Mr. Allen rather anxious to make a settlement in some way?

A. He manifested considerable anxiety.

Q. Didn't like to be detained here?

A. No, I should judge not.

Q. How long after this was it before you finally settled up?

A. I think it was about a year.

Q. About a year after?

A. Yes, sir.

Q. That would be last spring some time, a year ago now?

A. Yes, sir.

Q. A year before this suit was brought?

A. I don't know when the suit was brought. It was about a year afterwards.

By Mr. Roberts:

When was it Allen came down, after this visit in April?

A. Do you mean the final settlement?

Q. Yes.

A. It was April 24th, 1866.

Q. A year after the other transactions?

A. Yes, sir.

124 The plaintiff, further to sustain the issue on his part, offered in evidence two papers, of which the following are copies, the 1st being a statement of the sales of the plaintiff's pork product by Miles Murphy & Co., identified as such by the last witness; and the 2d being a statement of the shipments of pork product from the packing-house of Murphy & Allen, at Des Moines, rendered to Benjamin F. Murphy, also identified by said witness.

125 *Sales by Miles Murphy & Co. of hog product rec. from Murphy & Allen, and consigned to B. F. Murphy.*

Feb. 10.	Flint & Thompson, 62 trs. lard, 22,177—3,439, 18,738, 21 5-8		$4,052 06
" 23.	Pryor & Sanford, 968 shoulders, 13, 978, 14 1-4		1,991 86
Mch. 11.	G. W. Phillips & Co. 439 hams, 5,195, 15 3-4		818 21
" 21.	W. Ewing, 172 sour shoulders, 2,738, 10		273 80
Apl. 4.	J. W. Findley, 231 sides, 8,970, 14		1,255 80
" 6.	Thos. Harback, 68 shoulders, 990, 12 1-2		123 75
" 14.	Grigston, 88 sour sides, 3,512, 9		316 08
" 18.	Grigston, 31 sour hams, 372, 13		48 36
" 18.	Grigston, 64 shoulders, 1,020, 12		122 40
" 18.	Grigston, 42 sour shoulders, 630, 7		44 10
	Cash, 1 ham, 14		2 00
	" 4 hams, 50, 15		7 50
	" 4 shoulders, 56, 12 1-2		7 00
	B. F. Murphy, 4 shoulders, 50, 16		8 00
20.	Murphy & Allen, 700 hams, 8,400, 14		1,176 00
	Murphy & Allen, 50 sour hams, 600, 11		66 00
	Murphy & Allen, 53 sides, 1,908, 14		267 12
Apl. 24, 66.	Murphy & Allen 940 sides, 3,339 7 1-2, 13		4,341 87
			$14,921 94

Charges.

Feb. 23, '65.	To cash	4,000 00	
Apl. 25.	Unloading cars, 31^{80}. Teaming from depot 4,00	35 80	
	Teaming down and loading on cars 62 trs. lard	10 00	
	5 hogsheads 8^{75}, hauling 2 00, packing 5 trs. hams 5 00	15 75	
	Weighing and delivering 14,000 lbs. shoulders	7 00	
	Taking out of celler and weighing 5,200 lbs. hams.	3 00	
	Labor and weighing bal. hams, shoulders, and sides	20 00	
	Insurance on bulk meat	20 47	
	One months storage 62 trs. lard, 8	4 96	
	" " " 65,373 lbs bulk meat 50 c	32 68	
	Bulking, 81,873, lbs bulk meat 2^{50}	204 67	
	Commissions sale 2 1-2, pr. ct. 14,883^{07}	372 07	
	Govt. tax on sales 1-10, pr. ct.	14 88	
Apl. 24, '66.	Murphy & Allen, packing charges on hogs at Des Moines, Iowa,	566 00.	5,297 28
	Bal.		$9,624 66
Apl. 24, '66.	Murphy & Allen, for freight charges on meat from Iowa		1,662 94
	Due D. K.		$7,961 72

Names of shippers.	No. of hogs packed.	No. of hams.	No. of sides.	No. of tierces of lard.	No. of tierces of grease.	No. of shoulders.	Weight of meat shipped.	Weight of lard and meat shipped.	Amt. on meat	Of freight on lard.	Shoulders Total.
U. S. Barnes & Co	4,500	8,913	8,988	407	20	8,441	5,714 31	1,530 51, gross. 1,300 01, net.	7,567 00	$1,713 65	$9,280 65
Hoyt & Sherman	638	1,286	1,276	68	------	1,273	87,598	230 18, gross. 195 65, net.	1,160 00	257 70	1,417 70
Sherman & Hays	1,040	2,100	2,100	94	------	2,093	1,244 85	335 14, gross 285 34, net	1,648 00	375 00	2,023 00
David Killinger	667	1,330	1,315	62	------	1,322	83,421	221 93, gross 188 00, net	1,105 00	248 50	1,353 50
R. W. Sypher	1,370	2,700	2,738	130	------	2,731	1,788 97	460 58, gross 389 08, net	2,275 50	515 85	2,791 35
Murphy & Allen, packers	3,360	3,204	5,851	300	------	6,648	3,139 36	1,054 00, gross 88,920 net	4,158 25	1,180 00	5,338 25
John Hays	108	------	------	11	------	------	------	3,985 gross 3,289 net	----------	44 75	44 75
Total	11,692	Hogs	------	------	------	------	------	----------	----------	----------	$22,249 20
Murphy & Allen, slaughterers	------	------	------	------	457	------	------	155,497 gross	----------	1,741 00	1,741 00
	162	Bbls.	Guts	29	Bbls.	Tong's	------	Bbl. Hams	----------	----------	338 58
											24,328 78

127 Lyman Blair, a witness called on behalf of the plaintiff, being duly sworn, was examined in chief by Mr. Roberts, and testified as follows:

Q. You are a member of the firm of Culbertson, Blair & Co.?

A. Yes, sir.

Q. Was in 1864 and 1865?

A. Yes, sir.

Q. You are a brother of C. B. Blair, who was in the Merchants' National Bank at that time?

A. Yes, sir.

Q. State whether or not certain pork received from the Murphys was sold by your house; under whose directions; and what was done with the proceeds?

A. It was sold under the direction of B. F. Allen, I believe; yes, sir, (referring to diary,) yes, sir.

Q. Did you personally see Mr. Allen at that time?

A. I believe he was in the office.

Q. At your office?

A. Yes, sir.

Q. Do you remember what was done with the proceeds?

A. I think there was some twenty-three thousand dollars that was paid to the Merchants' National Bank, and the balance was deposited to the credit of the Union National Bank, Coolbaughs.

128 *Cross-examination.*

By Mr. Jewett:

Q. Do you know where this stuff came from that you refer to?

A. It came from the house of B. F. Murphy, Miles Murphy and Co.

Q. A packing-house down here somewhere?

A. Yes, sir.

Q. Do you know whether it all came from that packing-house, at that time, together?

A. There was smoked hams that was sent to Duffield's and put in the smoke-house before the bulk-meats was taken down; the sides and dried and salted hams were taken down at one time—brought down from there.

Q. They were taken directly to your house?

A. Yes, sir.

Q. Where were the others?

A. In Duffield's smoke-house.

Q. Do you know who moved this bulk-meat you have referred to from the house of Miles Murphy and Co., or at whose instance it was done?

A. It was done under the direction of J. De Kooven, cashier of the Merchants' National Bank.

Q. Did you see any of the warehouse receipts at that time relating to that meat?

A. I think I saw some receipts.

Q. Do you know who held them or for what purpose?

A. The Merchants' National Bank.

129 Q. Do you know for what purpose they held them?

A. I suppose they were held as collateral on the indebtedness of Messrs. Murphy.

Q. Do you know how you got possession, or how Culbertson and Blair came to get the control of those Duffield hams?

A. Well, they were deposited; they were left at Murphy's before he went home, B. F. Murphy; and then Murphy and Allen took a contract from government of some one hundred thousand pounds of smoked meats; he put in fifty thousand pounds and I put in fifty thousand; these hams were in the smoke-house, and they were delivered occasionally by order of Mr. Allen.

Q. Do you know who held Duffield's receipts for the hams at the time this other stuff came into your packing-house?

A. I think Mr. Allen held the receipts.

Q. It was not a part then of the stuff that came to you from the Merchants' National Bank?

A. No, sir.

Q. Do you know whether your brother had anything to do with or directed the sale of any of the stuff—the president of the bank?

A. I think not.

Q. You don't remember that he did?

A. No, sir.

Q. Did the proceeds of it, about twenty-three thousand dollars, include a portion of the proceeds of the hams which were put in?

130 Yes, sir; Allen gave an order on us for $2,300, gave it to the bank; we paid that order and deposited the balance to his credit.

Q. Have you got that order now?

A. I presume it is among our papers, but I am not sure.

Q. Could you state from memory, definitely, whether it was an order for the $2,300, or whether so much out of the proceeds of the hams as would make up together with the proceeds of the sale of the other meat the $23,000?

A. I could not say how the order was worded.

Q. It took a portion of the hams to make the $23,000?

A. Yes, sir.

L. E. Murphy, a witness called on behalf of the plaintiff, being duly sworn, was examined in chief by Mr. Roberts, and testified as follows:

Q. You are one of the firm of Miles Murphy & Co?

A. Yes, sir.

Q. A son of Miles Murphy, who has testified?

A. Yes, sir.

Q. What was your business in the firm through the winter of 1864 and 1865?

131 A. I had charge of the packing-house.

Q. Were you present when the Des Moines pork came?
A. Yes, sir.
Q. You received it, did you?
A. Yes, sir.
Q. State how you arranged that pork here? did you understand it was owned by different persons as it came in?
A. The bills came to the house for each car; in each car many pieces and sides belonged to different parties; and when it came into the house we separated it.
Q. Who paid the freights?
A. That was paid by Miles Murphy & Co.
Q. Do you remember how much that amounted to?
A. I do not.
Q. Can you approximate to it?
A. I dont think I can.
Q. Who made sales of that?
A. B. F. Murphy, I think.
Q. Did you sell any of it?
A. I don't think I did; am not positive about it.
Q. What did he do with the money?
A. Who?
Q. What did Frank Murphy do with the money that came from that pork, if you know?
A. I dont know much about the details of the business; I was at the office.
132 Q. You remember when he hurt himself some time late in January, or early in February, and was laid up?
A. I think he hurt himself in January, either January or February. At that time I spent the time between the packing-house and office.
Q. Did you make any deposits at that time?
A. I think I made one.
Q. How were the deposits made?
A. I cannot say. I think it was made by B. F. Murphy.
Q. Do you know anything about this sale to Finley?
A. I do not; at least I have forgotten it.
Q. Are you acquainted with the arrangement personally that was made about the commissions? Was you present when the arrangement was made with Frank Murphy?
A. I don't think I was when it was settled; but I had some talk with B. F. Murphy with regard to it.
Q. Previous to the time it was made?
A. Previous to the time it was made.
Q. State whether, previous to the time Frank Murphy left, there was any understanding with any one that Killinger's hogs stood in any other relation than the others.
A. I think not.
Q. Do you know with whom correspondence had with Allen was had?
A. B. F. Murphy.

Q. All together?

133 A. I think so.

Q. This pork all came consigned to B. F. Murphy?

A. I think it was consigned to him; I won't be positive about that.

Q. Did you sell any of this Des Moines pork?

A. I think I sold some shoulders at one time when B. F. Murphy was sick; I am not positive.

Q. What did you do with the money?

A. I am not positive in regard to the sale. I made one sale, but the party refused to take it; but whether I made any more I am not positive.

Q. That was while B. F. Murphy was sick?

A. Yes, sir.

Q. Look at that paper, and state if you are acquainted with the handwriting, and what you know about it.

A. I think that is Mr. Allen's handwriting.

Q. What do you know about that fragment of a letter? Where did that come from?

A. I cannot say. After B. F. Murphy left I went to his file of letters, and took off quite a number from Allen to him, and some I left there. It is probably one of the letters that was left.

Q. Where are those letters now?

A. I don't know.

Q. Have you searched for them?

A. I have.

Q. They are lost?

134 A. They are lost or misplaced. I don't know where they are.

Q. Are you able to state the contents of them substantially?

A. I am not.

Q. Where is the remainder of that letter?

A. I cannot tell.

Q. Was that all you could find of it?

A. I don't know as I looked for this. I think I have seen the letter before.

Q. You don't know where the remainder of this is?

A. No, sir.

Q. Have you looked for letters from Allen to B. F. Murphy, and Miles Murphy & Co.?

A. I had a lot of letters at that time; but had them all in one package, and after I got through with them I laid them away. What became of them I don't know.

Q. You have searched for them diligently?

A. Yes, sir.

Q. Have you looked among your papers for any from Allen?

A. I was looking at that particular lot of letters.

Q. Have you or your house any letters in your possession from Allen?

A. I don't think there is.

Q. You don't remember of giving this to Killinger?

A. I don't know whether I did. I handed Killinger some papers, and it might have been among them. I think I gave him a
135 letter at one time. Whether that is the one I didn't know.

(The plaintiffs then offered in evidence the [the] letter referred to, the admission of which as evidence the defendants, by their counsel, objected, on the ground that the paper purporting to be a letter was not signed, and upon its face appeared to be only a part of the original, and because the matter contained in it was irrelevent to the issues in the case; but the court overruled the objections, and permitted the letter to be read in evidence; and to the ruling of the court on that behalf the defendant, by their counsel, then and there excepted. The paper was thereupon read to the jury as follows:)

OFFICE of B. F. ALLEN, BANKER,
Des Moines, Iowa, Feb'y 5, 1865.

FRIEND MURPHY: I have nothing from you in relation to pork for several days, and consequently suppose nothing has been done. I have just received my ac. current with Coolbaugh & Co. for January, and find that $10,000 check charged up to my ac. the day you presented it. I thought it was understood that Coolbaugh was to hold it a short time, and that you were to take it up, and
136 that it was not to be charged to my ac. My balance shows largely overdrawn; and as I had not calculated on having to pay that draft, I am short that amount at a time when I need all I can raise, as I have just been called on by the First National Bank here to pay them over $50,000 which I had on call, and the government has called on them, and they have to call on me, and I must respond. I shall, therefore, count on your depositing with Coolbaugh or Union National Bank $10,000, just as soon as you receive this letter, or on Tuesday. I will be compelled to draw against it, and shall take it for granted that you have made the deposit.

Sypher telegraphed me some days ago that 3,000 shoulders were sold. I suppose the proceeds of it will also be deposited by that time. I was in hopes that by this time more stuff would have been sold; but the sudden fall in gold put a stop to sales at our figures. As gold has again taken the upward turn I hope the markets will again improve, and enable us to unload all our stuff. Allen & Murphy have here about 3,000 shoulders, 3,000 hams, 900 sides. I have about concluded to keep the sides and hams here, and send the shoulders to Chicago; will start most of them this week. I think we can sell the sides and hams here at better rates than you
137 can in Chicago, as there will be a demand from the west. I am going to smoke them; will commence to-morrow. It was very unfortunate for you and all of us that you met with such a serious accident; but I suppose you ought to feel thankful that it is no worse. I hope by the time this reaches you that you will again be around and get things moving, as Sypher, Barnes & Cook are in Chicago. I hope this week will open up more favorable, and that something can be done for us all.

Cross-examination.

Q. You stated B. F. Murphy made the sales of this Des Moines stuff. Didn't he generally make the sales for the house?

A. He did the pork sales.

Q. That was his particular business was it not?

A. Yes, sir.

Q. You stated you made a deposit, you think, during January. Where and to whose credit did you make the deposit?

A. I deposited Miles Murphy & Co.'s check at Coolbaugh's, and they gave me a letter of advice to Allen.

Q. Do you know what stuff it was that was sold?

A. I do not.

Q. The proceeds of that?

A. I don't know.

Q. Do you know what time in January that was?

138 A. I cannot give the date.

Q. That was when B. F. Murphy, was here?

A. Yes, sir; it was in January or February.

Q. Do you know what time in the month it was?

A. I cannot tell.

Q. Do you know how long he was laid up?

A. I think about two weeks.

Q. This was at any rate during the time?

A. During the time he was laid up.

Q. Do you recollect the amount of the deposit?

A. I think it was about $12,000; it might have been more, and might have been less; I think that was about the amount.

Charles G. Cooley, being recalled on behalf of the plaintiff, was examined in chief by Mr. Roberts.

Q. Will you examine this account handed to you, and state to the court whether you have verified that account with your books?

A. I have compared them with the books and find them correct precisely; one of them, the statement of the account, was made by myself, also one of the account of sales; one of them was

139 made by Culbertson. I find it agrees with the statement of the books.

Q. Are you able to state when the hams were put in the smoke house of Duffield to be smoked?

A. I cannot say.

Q. Was it as early as April?

A. I have no date at all to go by; they were placed there by Miles Murphy and Co., and I would not be likely to know when they were put there.

Cross-examination.

By Mr. Jewett:

Q. Do you know when the stuff that went from the packing-house was sold; whether before or after Allen came?

A. My impression is it was sold before he came here; but it was not delivered to the parties until the time he came here.

Q. You mean the stuff that was taken from Murphy and Co's packing-house down to Culbertson, Blair and Co's house?

A. Yes, sir.

Q. Do you know the date the proceeds of the pork were paid?

A. I do not; it is only supposition; my supposition is—

Q. You did'nt see the notes?

A. I don't recollect of seeing the notes.

Q. You did'nt take them up when you paid the money over?

140 A. No sir; I did'nt pay all the money myself, I think it was paid at two different times; I might have paid one payment on it, but don't recollect of having taken up the notes.

Re-direct examination.

Q. You say the sale was made before Allen came?

A. Yes, sir.

Q. They refused to take it?

A. They first refused to take them.

Q. Then the Merchants' National Bank got possession of it and sent it to your pork house?

A. It was sold in the first place for the Merchants' National Bank; it was not sold until after it came into our house; sold for the Merchants' National Bank of Pryor and Sandford.

Q. Did they or not decline to take it before Allen came?

A. There was some controversy in regard to their having a right to receive it.

Q. Was the matter consumated and the pork delivered before Allen came or not?

A. I am unable to state positively; but I don't think they did take them until about the time he came here.

141 The counsel for plaintiff then offered in evidence and read to the jury the statement and account of sales referred to in the testimony of witness as follows:

CULBERTSON, BLAIR & CO.,
Commission Merchant & Packer.

CHICAGO, *Apl.* 24, 1865.

Sales for ac't of whom it may concern:

Rec'd from Messrs. Murphy & Co.

1865.		
Apl. 17.	Pryor & Sanford, 2,923 per A sides, 105,927. 13.....	13,770 51
" 18.	G. W. Phillips, jr., & Co., 21,15; per dry salt hams 25,000; 14.....	3,500 00
" "	Armour & Co., 1,767; dry salt hams.....	2,952 46
" 22.	Cash, 238 sour hams, 21,089 lbs. 14.....	364 10
	3,310 lbs. 11	
		20,587 07.

Charges:

To Insurance, $22,000, 10 do. ⅝	17 60	
" Commissions, $13,771. 51 sides, 1½ pr c.	17 60	
" do $6,816 56 hams, 1 pr c	68 16	
U. S. tax	20 57	
	175 29	
Net p'ds		$20,411 87

E. & O. E.
(Signed) CULBURTSON, BLAIR & CO.
COOLEY.

142 CULBUTSON, BLAIR & Co.,
Commission Merchants & Packers.

CHICAGO, *June* 6, 1865.

Sales smoked hams. (Murphy lot) for ac't B. F. Allen, Des Moines, Iowa.

Govn't.
6,968 pcs. hams smoked, 76,156 lbs.
16-91 12,377 97

Charges:

Smoking and packing, charges paid to Messrs. Duffield & Co	611 44	
Commissions, 1 pr. c. on sides	128 77	740 20
Net brands to your credit	$12,137 77	

E. & O. E.
(Signed) CULBUTSON, BLAIR & CO.

143 B. F. ALLEN, ESQ.,
In acc't with CULBUTSON, BLAIR & Co.

1865.			
Ap'l 17.	By sales of sides and hams per acc't ren'd		$20,411 87
June 6.	" " hams to govn't " "		12,137 77
			DR.
Ap'l 20.	To dep'd Merchants' Nat. Bank	$20,000 00	
" 25.	" insurance on hams in smoke-house	21 96	
" "	" p'd Duffield smok'g 41 sour hams	1 97	
" "	" p'd inspection hams sold govn't	37 50	
" "	" p'd keeping horse, to De Kooven	22 00	

April 25.	To dep'd Merchants' Nat. Bank	3,000 00		
" "	" govn't tax on sales to govn't $\frac{1}{10}$	12 88		
" "	" dep'd Union Nat. Bank....	9,453 33		
		32,549 64	$32,549 64	

CHICAGO, *June* 9, 1865.
E. & O. E.
(Signed) CULBUTSON, BLAIR & CO.
COOLEY.

The plaintiff, further to sustain the issues on his part, then offered in evidence and read to the jury the deposition of one Eli Phillips taken in the cause, as follows:

144 Deposition of witnesses taken on the 14th day of December, A. D., 1866, taken between the hours of 8 a. m. and 6 o'clock p. m., at my office, No 429 Chestnut street, in the city and county of Philadelphia, and State of Pennsylvania, before me, William V. Archer, an Illinois commissioner, and also commissioner named in the within commission, upon the enclosed interrogatories and by virtue of the enclosed commission, to be read in evidence in a certain suit now pending in the Circuit Court of the United States for the northern district of Illinois, described in said commission and interrogatories wherein David Killinger is plaintiff, and Benjamin F. Murphey and Benjamin F. Allen are defendants.

Eli R. Phillips, witness, age 21 years and upwards, being first duly sworn to testify the truth in relation to the matter in controversy, doth depose and say:

1st int. What is your name, age, residence and occupation?

Answ. Eli R. Phillips; age 24 years; residence 131 Chestnut street, Philadelphia; occupation stock-broker.

145 2d int. Do you know the parties to the suit, or either and which of them; and how long have you known them respectively?

Ans. I am acquainted with the plaintiff, Killinger; I have known him about 4 years. I am also acquainted with the defendant, Murphey, but not with Allen. I have known Murphey since January, 1865.

3d interrogatory. Where were you on or about the 9th day of January, 1865? If in Chicago, how long, before and after; and about what time were you there?

Ans'r. I was in Chicago on or about the 9th day of January, 1865. I went there in August, 1861, and left there September 1st, 1865. I was in Chicago during the whole of the months of January and February, 1865.

4th int. Did you hear any direction given by the plaintiff, Daniel Killinger, to the defendants, Murphey & Allen, or either of them, relative to the sale of the pork, hams, sides, shoulders and lard, or any of it, of the said Killinger in the hands of the said Murphey and

Allen for sale? If yea, state all that was said on that subject by said Killinger, and to whom, what reply was made, and give as nearly as you can the time when it occurred. State fully all you know on the subject of this inquiry.

Answ. Yes; I did hear directions given by the plaintiff, Killinger, to defendant Murphey, in relation to the sale of Mr. Killinger's pork. As far as I can recollect, the facts are these: Some day during the month of January, 1865, I accompanied Mr. Killinger, at his request, (who was unacquainted in Chicago,) to the office of Murphey & Co.

When we reached there we found Mr. Murphey, with whom I
146 had a previous acquaintance. Mr. Killinger made himself to Mr. Murphey. A conversation then ensued as to the pork-packing at Fort Des Moines, and as to the sale of the pork and lard; the shoulders and ham and sides all went under the name of pork. Mr. Killinger asked Mr. Murphey if his pork had been sent on by Mr. Allen from Fort Des Moines. Murphey said in reply that a portion of it had been sent on but not all. Mr. Killinger then said that pork was at that time bringing a good price, and directed Murphey to sell immediately. Murphey said that the balance of Killinger's pork was at that time on the road from Fort Des Moines to Chicago. Mr. Killinger told him as soon as it arrived to sell. Mr. Killinger asked him what price pork was bringing. Murphey told him, but the price I do not now remember. The price of pork and ham, shoulders and sides and lard, were all given. Mr. Killinger directed him to have all sold as soon as it arrived. Murphy promised to have it sold, and would sell it under their brand; he said, as it was packed by their house, it would command a larger price. Mr. Killinger directed Murphey to to deposit proceeds of the sale of the pork to credit of B. F. Allen, at Coolbaugh's Bank, Chicago.

5th int. State any other fact or facts within your knowledge tending to show that the plaintiff is entitled to recover in this action.

Answ. On several occasions subsequently I accompanied Mr. Killinger to the office of Murphey & Co., and heard conversations on this subject pass between the parties. The conversations were all
in relation to the sale of this pork. Murphey said he had
147 a letter from Mr. Allen stating that he had shipped Killinger's pork. Mr. Killinger invariably directed Murphey to sell on arrival of pork. Murphey always consented to sell. The last conversation I heard pass between Killinger and Murphey in relation to the matter, Mr. Killinger directed Murphey that when the pork or any part of it was sold, to deposit proceeds to his, Killinger's, credit at the Fifth National Bank of Chicago. At that time, so far as I could learn, no part of the pork had been sold. I do not recollect anything else of material interest.

ELI R. PHILLIPS.

Cross-interrogatories.

Cross-int. 1st. If in answer to the 4th cross-int. you say you heard a conversation between the plaintiff and either of the defendants, at the time and place inquired about, or at any other time or place, state with which one or the def'ts the conversation was. Was the the def't Allen present at all during that conversation?

Answ. The conversation was with the defendant B. F. Murphey at the office of Murphey & Co. The defendant Allen was not present at all.

2d cross-int. In whose office or place of business was the conversation referred to by you, if you speak of any had, and who was present?

Answ. The conversation took place in the office of Murphy & Co. There were in the office at the time of the first conversation two other parties of the name of Murphey and a clerk; these parties were
148 in the office but not present at the conversation, as we went to one side.

3d cross-int. Did you then, or at any time, know of a commission-house doing business in Chicago under the name and style of [of] Miles Murphey & Co.? State if you know who composed said firm.

Ans. I knew of such a house as Miles Murphey & Co. I did not know who composed the firm.

Cross-int. Was not the conversation you referred to, if any, between the said plaintiff and one of the members of said firm of Miles Murphey & Co.? and if so, which one?

Answ. The conversation I referred to was with B. F. Murphey, at the office of Murphey & Co.

Cross-int. 4. Was any money at or about that time paid to the plaintiff as proceeds of the sale of his pork, lard, or other hog products? and if so, how and by whom was it paid? If by check, by whom was the check drawn, and what directions, if any, was given by the plaintiff to the parties or party for paying said money in respect to the proceeds of other sales to be made by them on account of the plaintiff?

Ans. No money was paid the plaintiff in my presence, either by check or otherwise; but I heard that they had paid him (Killinger) $4,000 on account of his lard. At the first conversation the plaintiff told Murphy to deposit proceeds of sales of pork to credit of Allen at Coolbaugh's Bank. At a subsequent conversation, Mr. Killinger instructed Mr. Murphey to deposit to his (Killinger's) own credit in Fifth National Bank of Chicago.

Cross-int. 5. If you have attempted to give any conversation
149 which you overheard, or was a party to, in answer to any or either of the direct interrogatories, state where you were during said conversation, how came you to be in that position. At whose request were you there? Was any one besides yourself within hearing distance of the parties conversing?

Answ. I was in Murphey & Co.'s office, Mr. Killinger, being a stranger in Chicago, I went with him, at his request, to show him

the office of Murphy & Co. The three of us were sitting together at the back part of office. There were other parties within hearing distance, but I don't know as they heard what we said, as they were busy at their desk.

Cross-int. 6. Were you not in the employ of, or in any way connected in business with, the plaintiff at the time referred to, and have you been since, or are you now so connected with the plaintiff? Have you heard the plaintiff talk about the conversation referred to? and if so, how often?

Answ. I was not employed by the plaintiff, or in any way connected in business with the plaintiff at the time referred to. I have not since nor am I now. I have heard him talk about the conversation referred to once.

Cross-int. 7th. Please state the exact language of each of the parties to that conversation in the order of its occurrence.

Answ. I cannot give the exact language. I can only state the purport, as I have already done in my answer to the 4th direct interrogatory.

Cross-int. 8. Had you any interest in the conversation referred to at the time, which induced you to give it more than ordinary
150 attention? and if so, what interest?

Ans. I had no interest, but paid attention to what they were saying. I once or twice spoke with regard to the price of pork and the prospects of the market.

Cross-int. 9th. Was there anything in the time, place, or circumstances of that conversation which tended to fix it in your memory more firmly and distinctly than any ordinary conversation between business men which you may have accidentally ever heard? If so, what was it?

Ans. I did not accidentally overhear the conversation, as I accompanied Mr. Killinger at his request; was seated along with them, and joined in the conversation. These facts tended to fix the matter firmly and distinctly in my mind.

Cross-int. 10. Is your memory so good that you can repeat either the language or substance of such conversation which you may have incidentally heard within the past two years?

Ans. Yes; I can.

Cross-int. 11. May you not have mistaken or misunderstood the language of the parties to that conversation?

Ans. No; I did not. I paid particular attention to what was going on.

Cross-int. 12. Can you, speaking positively and from recollection of the conversation alone, and without reference to anything which you have since heard, give the language of the conversation, and prove that you have given the substance of it without mistake or coloring.

Ans. I speak positively, and aver that I have given the substance of the conversation correctly, without mistake or coloring, and
151 without reference to anything that I may have since heard. The exact language I cannot give.

ELI R. PHILLIPS.

STATE OF PENNSYLVANIA, *City and County of Phil., ss:*

I, William V. Archer, the commissioner named in the annexed commission, and a commissioner of Illinois in and for said city and county, do hereby certify that the witness, Eli R. Phillips, prior to the taking of the foregoing deposition, and on the 14th day of December, ~~A. D.~~ 1866, was by me first duly sworn to testify the truth, in relation to the matter in controversy in the suit mentioned in the caption to these depositions, and in the enclosed commission, so far as he might be interrogatod in relation thereto.

And the said deposition was, on the said 14th day of December, A. D. 1866, at Philadelphia, in said county and State, taken and reduced to writing by myself, and signed and sworn to by said witness in my presence.

Given under my hand as the comm'r named in the said commission, and under my hand and official seal as commissioner of Illinois, this 14th day of December, 1866.

[SEAL.] WM. V. ARCHER,

Commissioner appointed to examine witnesses under annexed commission, and Commissioner for Illinois, in Philadelphia, Penn'a.

[5 ct. rev. stamp cancelled.]

152 David D. Michaels, a witness called on behalf of the plaintiff, being duly sworn, was examined in chief by Mr. Roberts, and testified as follows:

Q. What was your business here in the winter of 1864 and 1865, and spring of '61?

A. Commercial reporter.

Q. State whether or not you are acquainted, from actual sales of the prices of pork, shoulders, hams, and sides, respectively, during the month of February, 1865, in this market?

A. I was at the time.

Q. Have you any memorandum now, made at the time, which will enable you to state the prices at that time in this market?

A. I have.

Q. State it.

A. I should have to refer to my memorandum. I have in my book (witness produced the book) sweet pickled hams.

Q. The green meat?

A. Bulk-meats.

Q. Yes, sir.

A. Dry salted hams, 15, 15⅔ cts.

Q. What are these dates?

A. February 10th and 22nd.

153 Q. This 15 cts. is what date?

A. On the 10th.

Q. What sales do you find shoulders and sides?

A. I find shoulders range from 14½ cts. to 15½ cts.

Q. What do you find sides?

A. I don't find any quotations for rough sides at all in my report for February.

Q. What quotations have you of shoulders, sides, and hams, up to the 12th of March?

A. Mess pork or prime hams.

Q. Bulk-meats?

A. Bulk-meat includes dried salted shoulders, dried sides, short middles, etc. I was only requested to make a statement of rough sides, hams, and shoulders. I can refer to the others here in the book.

Q. What is called rough meat we want; you have given us hams and shoulders; if you can give us rough sides.

A. I don't find any as yet. I seldom have mad a quotation unless it was founded on a sale. I find on the 3d of March rough sides quoted $16\frac{3}{4}$ @ $17\frac{1}{4}$ cts.

Q. Do you find any down to say the middle of March?

A. March 7th I find sales of dry salted hams at $15\frac{5}{8}$; on the 10th of March I find a sale of eighty thousand pounds at 16 cts.

Q. For what meats?

A. Dry salted hams.

Q. Yes, sir.

154 *Cross-examination.*

By Mr. Jewett:

Q. Were there or not, during the time you have referred to, many transactions in this kind of meat?

A. There were not a great many transactions in rough sides; almost daily transactions in shoulders.

Q. Of rough sides there were not many transactions?

A. Not many transactions; my memoranda is, they were very slow sales, nearly all that manner.

Q. Do you know whether it was difficult to make sales at those prices of that kind of meat?

A. I am inclined to think it was of rough sides.

By Mr. Roberts:

Q. Have you quotations of sides through April?

A. I have not my April book; I only made out a memorandum down to the 1st of April; I have quotations at my office all through.

By Mr. Jewett:

Q. Was there any difference, to your knowledge, between country products and city products; that is the product of packing-houses in the city and country?

A. There is usually a difference, unless by some old standard packers in the country, who have a standard reputation.

Q. To which of the meat is the preference given?

A. City-packed has the preference.

155 Q. To which kind of meat, city-cured or country-cured, do these prices apply?

A. This last sale of hams I quoted was country hams.

Q. That was the 10th of March, at 16 ct's?

A. Yes, sir.

Q. How is it with other quotations?

A. It is not specified; I presume they were mostly city, but am not positive of that.

Q. With the two kinds of meat in the market, could or not one be sold rather than the other, at the same figures?

A. Well, yes, sir; as a general thing, city would have the preference, even if it was not as good, when the county stands equal to the city; we generally did not mention any difference in making our reports, simply reporting so much meat; when the prices are less than the city, we specify it as country meat.

The plaintiff here rested; and the defendants, to maintain the issues on their part, offered as evidence and read to the jury the deposition of McVickar in this cause, as follows:

156 Circuit Court of the United States for the Northern District of Illinois.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY AND
Benjamin F. Allen.

UNITED STATES OF AMERICA,—*District of Iowa, ss.*

Benjamin F. Allen, being duly sworn, says that he, on of the defendants in the above-entitled cause; that it is advised by his counsel, and verily believes that the testimony of Geo. A. McVicker, at present residing in the city of Des Moines, Polk county, Iowa, a place greater than one hundred miles from the place of trial, is a material witness, and necessary for this defendant in the proper defense of such cause; that said McVickar lives at Des Moines, Polk county, Iowa, more than one hundred miles from the city of Chicago, in the said northern district of Illinois, where the court at which this deponent expects the said cause will be tried is appointed by law to be held; and this defendant further says, that as he is informed, and believing said David Killinger, said plaintiff, resides at some place in the State of Pennsylvania, more than one hundred miles distant from Des Moines, aforesaid, the place where the examination of said
157 witness is expected to be taken, and that as he is also informed and believes the attorney of said David Killinger resides in Chicago, Illinois, about four hundred miles from Des Moines, aforesaid.

BENJAMIN F. ALLEN.

Subscribed and sworn to by Benjamin F. Allen before me, at Des Moines city, Iowa, on this 5th day of January, A. D. 1867.

STEPHEN SIBLEY,
U. S. Commissioner for District of Iowa, resident at Des Moines.

UNITED STATES OF AMERICA.—*District of Iowa, ss:*

Be it remembered, that on the 5th day of January, A. D., 1867, at Des Moines city, Iowa, in said District, Benjamin F. Allen, personally appeared before me, Stephen Sibley, a commissioner appointed under the laws of the United States to take affidavits and acknowledgements of bail, and made oath that he, the said Benjamin F. Allen, was defendant in a suit then depending in the Circuit Court of the United States for the northern district of Illinois, being the circuit, wherein David Killinger was plaintiff, and one Benjamin F. Murphy was a co-defendant with said Benjaminin F. Allen; that the testimony of George A. McVicker, of Des Moines city, in
158 the State of Iowa, book-keeper, was material and necessary for him, the said defendant, Benjamin F. Allen, in the defense of said suit, and that he, the said George A. McVicker lived at Des Moines city, Polk county, State of Iowa, more than one hundred miles from Chicago, in the State of Illinois, where the court at which the said defendant expected the said cause would be tried was appointed by law to be held; that David Killinger, the above-named pl'ff, resides at or in the State of Pennsylvania, more than one hundred miles distant from Des Moines aforesaid, and that the attorney for said David Killinger, whose name was to the defendant unknown, resided at Chicago, in the State of Illinois, as deponent was informed and believed, and about four hundred miles from Des Moines aforesaid; and the said Benjamin F. Allen requested me that the said George A. McVicker might be examined, according to the direction of the act of Congress in such case made and provided.

Whereupon I ordered the said George A. McVicker should be examined de bene esse, before me, at Des Moines city, in the county of Polk, and State of Iowa, at my office, in the city last aforesaid, on the 5th day of January, A. D., 1867, at 3 o'clock, p. m., of said day; and the said Benjamin F. Allen, appearing before me at my office as aforesaid, at the time aforesaid, as well as in person as by attor-
159 ney, I have proceeded with said examination; and the said George A. McVickar being carefully examined, and cautioned, and duly sworn to testify the whole truth, and nothing but the truth, saith as hereinafter stated, as answers to the questions as hereinafter written and propounded by B. Rice, esquire, the attorney appearing, as stated hereinbefore for the said Benjamin F. Allen.

That is to say—

Question 1st. What is your name, age, place of residence, and occupation?

Answer. My name is George A. McVicker; age twenty-five years; place of residence is Des Moines city, Iowa; and my occupation is that of book-keeper.

Question 2nd. Are you acquainted with the parties to the above-entitled cause, and were you two years of ago?

Answer. I was.

Question 3rd. Were the def'ts partners in any business two years since? and if so, what was it?

Answer. They were in business together here as pork-packers.

Question 4th. What relation did you hold with said firm, if any?

Answer. I was their book-keeper and shipping clerk.

Question 5th. Do you know any transaction which the pl'ff, David Killinger, had with the def'ts, Murphy and Allen?

Answer. I do; they (the def'ts, as such firm) slaughtered and packed hogs for said Killinger at this place.

Question 6th. State the transaction between pl'ffs and def'ts about such business?

160 Answer. The pl'ff, Mr. Killinger, brought hogs to the packing-house of def'ts to be slaughtered and packed and held subject to his order. The hogs of Mr. Killinger, pl'ff, were slaughtered, packed, and shipped to B. F. Murphy, on account of David Killinger, the pl'ff, at Chicago, Ill.; the entire product of all the hogs brought them by Mr. Killinger, pl'ff, was shipped thus at the express direction of Mr. Killinger, the pl'ff. He gave such directions to me at the time at the packing-house. I mean he gave such directions while the hogs were being slaughtered, they were shipped some twenty days thereafter. He also mentioned such directions after they were slaughtered, and about ten days before shipping; all the hogs received and slaughtered by def't for pl'ff were so disposed of, except a few barrels of grease disposed of here with the assent of the pl'ff, and settled for with him.

Question 7. Do you know who received the pork and products at Chicago, shipped as stated above, and if so who?

Answer. Yes; Murphy & Co. received it all at Chicago. I was there soon after it was received, and saw it there. I also saw the pl'ff, David Killinger, there in Chicago, at Murphy & Co's office, at the same time I went there, while in the employ of Murphy & Allen, Des Moines, and for them to attend to the settlement of accounts between Murphy & Allen with Murphy & Co., of Chicago. Such accounts were relating to shipments for all parties here, of whom

161 there were several, and among whom were the pl'ff, David Killinger. Mr. Killinger then expressed his satisfaction with the shipment and his receipt of it then, and the course pursued by Murphy & Allen.

Question 8. Did the pl'ff have any business with Murphy & Co., and if so, what?

Answer. When I saw him there, I saw him converse with different members of the firm of Murphy & Co. respecting sales of pork and the condition and prospect of the market. It was stated in such conversations that Murphy & Co. had made sales of some of the pl'ff's pork or other hog products, and had received money from them on account of such sales.

GEORGE A. McVICKER.

And I do further certify that the preceding deposition was reduced to writing by me, and signed by the said George A. McVicker, and that I am not of counsel or attorney for either of the parties to the said suit, nor am I interested in the event thereof.

Done and signed by me at Des Moines City, Iowa, on this 5th day of January, A. D. 1867.

STEPHEN SIBLEY,
U. S. Commissioner for Iowa.

[5 ct. rev. stamp cancelled.]

Endorsed: Opened Jan'y 10, 1867 for Mr. Jewett, Wm. H. Bradley, cl'k.

And further to maintain the issue on their part, the de-
162 fendant then called, as a witness, the defendant, Benjamin F. Allen, who, being first duly sworn, deposed as follows :

Q. Where do you reside ?

A. Des Moines, Iowa.

Q. How long have you resided there ?

A. About eighteen years.

Q. What has been your business principally ?

A. Principally banking for the last twelve years.

Q. You resided there in the year 1864 and 1865 ?

A. Yes, sir.

Q. What other business were you engaged in at that point at that time ?

A. Well, pork-packing and slaughtering.

Q. In the fall and winter of 1864, were you engaged in this
163 last mentioned business ? and if so, with whom ?

A. I was engaged in the slaughtering and packing of pork for different parties.

Q. Who run the packing-house ? Who was interested in the packing-house with you ?

A. B. F. Murphy was interested.

Q. Did you pack in your own account or on account of Murphy and Allen ?

A. I packed on account of Murphy and Allen.

Q. Did you pack for other parties ?

A. Yes, sir.

Q. What other parties, about there, in that vicinity ?

A. Barnes and Company, Sherman, and Hays, and Sipher, I think, and a number of other parties.

Q. What was the business of Murphy and Allen ?

A. The real business was slaughtering.

Q. Did you or not make any advances on those parties for whom you packed and slaughtered ?

A. Yes, sir.

164 Q. By whom were the advances made ?

A. They were made by B. F. Allen individually. All the advances were made in that way.

Q. Taking these parties for whom you packed in that vicinity, to what extent had you advanced upon their hogs ?

A. I think, as near as my recollection serves me, at least ninety per cent. In some cases all of it.

Q. Had Murphy and Allen any interest as a firm in those advances

A. None whatever.

Q. Had they any in the money?

A. None in the business. Murphy and Allen owned the packing house jointly. In no other way had they any money in it.

Q. You say Murphy and Allen packed on their own account some hogs that season. Who advanced the money for the purchase of those hogs and expenses?

A. I advanced all the money and the expenses.

165 Q. What interest then had the firm of Murphy & Allen in those hogs?

A. The firm of Murphy & Allen was interested in the profit or losses.

Q. Resulting from the packing and sale of the hogs?

A. Yes, sir.

Q. To whom did the firm of Murphy & Allen consign the hog product for sale?

Their own.

Where was it sent, and to whom consigned for sale?

A. The greater portion of it was sent to Chicago, to B. F. Murphy.

Q. You say the greater portion. What was done with any other portion or the remaining portion that was not sent in that way? What occasioned the difference?

A. There was a few frozen hogs at Des Moines that were not cured in time to be shipped with the other, and we kept it there and smoked it, and sent part of it to St. Louis and part to Omaha.

Q. What amount was there of that?

166 A. I think the whole amount was probably not exceeding two hundred hogs. Some were frozen so hard we could not cut them, and before we got them cured the market broke down here and we thought we would try some place else, but we made a failure of it all round. We sent some to Omaha and never sold it, and the worms eat it; and we sent to St. Louis, and with pretty near the same result.

Q. Who had control of the product of the hogs of those parties upon which you had advanced largely?

A. I had control of it.

Q. Was there or not any pork packed at your packing-house at Des Moines, consigned to other parties than Murphy in Chicago, for sale?

A. I think there was.

Q. Can you state any house to which any portion of it was sent?

A. I think the firm of Martin Winters packed there, and it was sent to Simons. I think Buttle packed there. We sent to
167 another house in town. I don't know where they sent to, but not to Murphy & Company.

Q. Were those parties at liberty to send their hog product for sale where they pleased, and to whom they pleased?

A. Yes; they were under no obligation to send it to any particular house. The only understanding was wherever it was sent it was to

be considered mine, and the proceeds were to be placed to my credit wherever it was sent.

Q. Had you made advances on those products which you included in your last answer.

A. I had; yes, sir.

Q. When did you first become acquainted with the plaintiff in this suit?

A. I don't know as I can recollect exactly; it was prior to that time—how long I don't know, perhaps two years.

Q. Prior to the fall of 1864, had you had any business re-
168 lations with him? if so, what.

A. Well, the house was operated a year before that I think by different parties. I had some business relations with him in that way as a firm, not as an individual.

Q. Had you business relations with the plaintiff Killinger?

A. Yes, sir; I was thinking of Murphy when you asked the question.

Q. State what they were.

A. I had frequently cashed drafts for him. He was a stock dealer and had drafts on parties east.

Q. You knew him as a stock dealer?

A. Yes, sir.

Q. You think two years prior to that?

A. I don't recollect; but much as two years I should think. When you first asked the question I did not understand you.

Q. You had no connection with the packing-house prior to the fall of 1864?

A. No, I think not. I don't recollect when I bought it.

169 Q. When in the fall of 1864, according to your recollection, did you first see the plaintiff Killinger?

A. I cannot recollect. He was there at different times, but I don't know when I first saw him.

Q. Do you remember seeing him there prior to the time of his coming there with a drove of hogs?

A. Not specially; no, sir.

Q. State as near as you can about the time of your first interview with him in relation to his hogs.

A. The interview about the hogs was shortly before the killing of them, some days; I don't know just how many; he was driving, and the weather and roads were unfavorable and the markets bad, and it was suggested that it would perhaps be better for him to pack than ship under the circumstances.

Q. About what time was this?

A. Well, it was a short time before they were packed; the dates I never can recollect.

Q. Can you tell the month?

170 A. I don't know as I can. I never can recollect dates. It was during the packing season.

Q. In the beginning or latter part of the packing season?

A. It was during the packing season. I should think it was in November.

Q. Do you recollect whether there was any snow on the ground at the time?

A. I recollect the roads were bad, and it was bad driving; but don't know whether there was snow or not.

Q. Where did you have the first interview with him in relation to those hogs?

A. In my office, in the morning.

Q. Did you have more than one prior to the arrival of the hogs at Des Moines?

A. I don't recollect whether I had or not.

Q. State as near as you can the conversation, or conversations, that took place between you with reference to packing and shipping those hogs, how the conversation begun, and the result of it?

A. Well, the conversation—I don't know just how it started;
171 but the substance of it was that he was driving hogs, and had a drove of hogs on the road to drive to Chicago, or on the road to the railroad to ship to Chicago, and the driving being bad for some cause or other, I do no not now recollect, and I think the markets were dull. The idea was it would be to his advantage to pack them; that I was packing others, and we thought it was better than shipping. After he had talked of it and studied over it, he finally concluded to do it, and we took them, just as we did other hogs there, to be slaughtered; and after they were slaughtered, and before he left, I asked him what I should do with the product. He says, "Do with it the same as you do with your own." He said he was going East, and I must do the same as with my own. After it was packed and cured, or partly cured, it was shipped the same as my own and others that was shipped from there that I had under my control.

172 Q. Did you make any advances to Killinger on account of this?

A. None whatever.

Q. Did Mr. Killinger have any other business with you at that time, except with respect to those hogs, when he came into your office?

A. I don't recollect whether he had or not. He might have come in to get a draft cashed; but I don't know.

Q. Do you remember that he did?

A. No, sir.

Q. Did he remain there while these hogs were being packed?

A. He was there during the packing several times. I don't know whether he remained there or not. I was in the bank all the time, and paid but little attention to the slaughtering of the pork. That is the truth of the matter. It was not my business to attend to it.

Q. Did you, in any of your operations in pork, undertake to have anything to do with the sale of the product?

173 A. I did not with none. There was no understanding by any one that I was to have anything to do with the selling of it, merely to slaughter, and pack, and cure, and ship it from the house. There was no understanding whatever with Killinger, or any one else, that I was to sell it.

Q. Did the firm of Murphy and Allen, who were packing there, have anything to do with the sale of the hog product?

A. The firm of Murphy and Allen had nothing to do with the sale of the product, nor reaped any benefit from the sale in any shape, way or manner.

Q. Can you tell at about what time the product of Killinger's hogs was shipped to Chicago?

A. No, sir; I do not know.

Q. Do you know, from being in Chicago, whether or not it arrived here?

A. I don't know of my own personal knowledge,; only I understood it was here.

Q. Do you know it from the plaintiff?

A. I don't think I do from the plaintiff. That is, I saw him
174 here, but I don't know whether it had all arrived or not, when I saw him.

Q. What house or firm made sales at Chicago of the hog product shipped to Chicago belonging to you, or Murphy and Allen?

A. The house of Miles Murphy and Company, or Murphy and Company.

Q. Do you know who composed that firm, or those firms?

A. I understood who. My understanding was Miles Murphy, B. F. Murphy, L. E. Murphy, and R. P. Murphy.

Q. What was the standing of this firm in the fall or early winter of 1864?

A. Well, before I sent anything to it, as I was shipping largely, I took some pains to inquire as to their standing, and found them standing about as well as any commission house in this city. I would not have shipped them three hundred thousand dollars worth of stuff if I had not supposed they were responsible.

Q. Did you ship your own stuff, or that over the shipping
175 of which you had the control, to any other house in Chicago than to go through that house?

A. I did not.

Q. What arrangement, if any, was made with that house in respect to the sale the product shipped to it from your packing-house?

A. They was to receive the stuff and sell it, and give me one and a half per cent. back of the commission, in consideration of my advancing money on all the stuff that I had advanced the money on.

Q. State upon what terms you had made this advance upon this product.

A. I charged the parties ten per cent. interest. The parties in Des Moines charged them ten per cent. on their over-drafts.

Q. Did you charge any commission for advancing?

A. None at all.

Q. This arrangement was made between you and Murphy
176 and Company for part of the commissions on the sales, in consequence of your advances upon the pork?

A. Yes, sir.

Q. Did Murphy and Company have any interest in the rebate of the commission?

A. Murphy and Company had no interest whatever in the rebate of commission.

Q. Did they apply to all the product—all on which you had made advances?

A. All upon which I had made advances was to be rebated.

Q. I will ask you if that is not usual in transactions between commission houses and shippers' country dealers?

A. As far as my experience goes it is usual. There are several of as good houses as there are in this city who have offered me the same thing. I shipped to Simmons, and they allowed me the same commission rebatement. That was last year. And other houses have offered me the same.

Q. The substance of the arrangement was, they were to
177 do your selling, and have one per cent. instead of the usual commission of two and a half per cent.

A. That was the substance of it.

Q. What was the usual course of business in respect to the proceeds of this product upon which you had advanced money—as to its being deposited or remitted. What was the understanding in respect to it?

A. My instructions were, as soon as the sales were made, to place the proceeds to my credit at the Union National Bank.

Q. Was that the same with other houses as with Murphy & Company?

A. The same with all other houses where there was anything shipped.

Q. When were you in Chicago after—say the middle January; and do you remember about what time you were here?

A. I think I was here the last of March or first of April, somewhere along there.

178 Q. Where you not here before that?

A. I very likely was; I passed through here frequently.

Q. Do you remember any conversation between yourself and B. F. Murphy in respect to anything that Killinger had told him about the disposition of the proceeds of the sale of this pork?

(Objected to.)

Q. You may state whether any conversation relating to the disposition of the proceeds of Killinger's pork was reported to you by Murphy?

By the court:

I do not think that is exactly proper; you may state whether the fact was reported to you by Murphy of the instructions of Mr. Killinger to Murphy, to deposit money in the Fifth National Bank.

A. It was.

By the court:

Q. When?

179 A. The time, I cannot recollect; it was in this city, and shortly after the stuff had arrived, or about the time it was arriving.

Q. You may state what reply, if any, you made to this statement?

(Objected to. Objection overruled, and exception taken by plaintiff.)

Q. State what reply you made?

A. I replied to him that I had no claim whatever on the meat, except the packing charges, and Mr. Killinger was perfectly good for that; and to do with it whatever he told him; I did not want anything to do with it.

Q. Do you know who was the principal managing man in the firm of Murphy & Co. at that time, or the principal salesman, who transacted the business of the firm in that line?

A. All the business I had with the firm was with B. F. Murphy; I understood he made all the sales, and he was the salesman of the firm, according to my understanding.

180 Q. Was he or not the senior member of the firm here?

A. That was my understanding; he was the senior member here.

Q. Do you remember having any conversation with Killinger in Chicago during the winter of '64 and 5? Do you remember of seeing him in Chicago?

A. I recollect of seeing him here.

Q. Do you remember of meeting him at the office of Murphy & Co.?

A. I do.

Q. Do you remember of any conversation had with him, or that you had any conversation with him?

A. Nothing of any importance, merely a friendly meeting.

Q. Had you had at any time an application from the agent of the government, for the sale of meats at Des Moines to the gov't, or on a gov't contract?

A. No, sir; never had any.

Q. Was it or not a market in which the U. S. made purchases?

A. No, sir; gov't never made purchases, except by adver-

181 tisement. A commissary has no right to make purchases any other way.

Q. Did you have any conversation with Killinger in Chicago, at the office of Murphy & Co., or any where else, in which you represented to him that there was a chance of making a sale to the gov't, and you wished you had kept the stuff back?

A. I am positive there never was in the conversation by me; it would be simply absurd, because the gov't did'nt buy in that way.

Q. Did you make any remark like this: that if the stuff was there, at Des Moines, you would sell out the whole "ball of wax," or any thing like that?

A. It is the first time I ever heard the term used by any living person, and I know I never used it myself.

Q. When did you first hear of any trouble with the firm of Murphy & Co., or Miles Murphy & Co.?

A. Well it was probably the second day after B. F. Murphy left; I don't know what date, early in April.

182 Q. Had you been here previously?

A. Yes, sir; I was here probably two weeks before B. F.

Murphy left and went home; and the very next day on my arrival, I received a telegram from Chicago that he had left.

Q. Did you know anything of the embarassment or failure of the firm, as you were here?

A. No, sir; I did'nt, or I should'nt have gone. I left my stuff all in their hands.

Q. Was there or not, at that time, a considerable amount of your stuff, or the stuff on which you had made advances in the hands of Murphy & Co.?

A. There was.

Q. Did you return on receiving the telegram?

A. Yes, sir.

Q. What was the condition of things which you found when you came?

A. I found everything in confusion, and could make neither head nor tail of anything for a while. I could'nt tell where B. F.
183 Murphy was gone—whether he was dead or alive, or where he was.

Q. What inquires did you make—what did you discover?

A. Well, I discovered in the first place, the property I left in the warehouse had been taken possession of by the Merchants' National Bank.

Q. Were you or not, able to get definite information in respect to the property that the Merchants' National Bank had possession of?

A. I could'nt get anything very definite. I searched diligently for information, but received it all under a good deal of a cloud.

Q. Could you ascertain at the office of Murphy & Co. the condition of things?

A. Not very definitely.

Q. Did you try?

A. Yes, sir, I did; tried all I knew how.

Q. Did you try to ascertain from the Merchants' National Bank, or from the presd't, Blair, what condition the things were in?

A. Yes, sir.

184 Did you, or could, you, satisfy yourself as to the exact condition of the claim? Did he hold this or claim to hold this meat from the packing-house?

A. No, sir; I couldn't get any information that was at all reliable as to how it was encumbered, or upon what securities he claimed to hold it; on what papers; it was all indefinite.

Q. Was there or not, both from the office of Murphy & Co. and Mr. Blair, information that Murphy and Allen were involved in the transaction with the bank?

A. Mr. Blair held out the idea.

(Objected to. Sustained.)

Q. Were there or not on the securities or notes which the Merchant's National Bank held any liabilities of Murphy & Allen?

(Objected to.)

By the court: The witness can state anything he saw.

By Mr. Roberts:

Has the witness the warehouse receipts?

185 Q. Have you the warehouse receipts that the Merchants' National Bank held?

A. No; I gave them up—the ones you speak of—to Mr. Robert Murphy; that's my recollection.

Q. Were or were not the warehouse receipts delivered to Murphy?

A. They were all delivered to R. P. Murphy, I think.

Q. I will ask you if you saw the warehouse receipts that the Merchants' National Bank held?

A. I saw what Mr. Blair said was all that he held.

By the court:

Q. How many were there?

A. I don't recollect.

Q. Was there a considerable number or a few of them?

A. There was several of them.

Q. Whose receipts were they?

A. As I recollect, they were Miles Murphy & Co., or Murphy & Co.; I don't recollect which; it was one or the other.

Q. Did you see the notes for which the Merchants' National Bank held these warehouse receipts, as securities?

186 A. I ain't certain whether I saw the notes or not?

Q. You don't remember whether you ever saw them or not?

A. I ain't right certain.

Q. Were you able to ascertain from either their office, Murphy & Co., or from the bank, what particular lot of pork product the bank had taken possession of upon these receipts? I mean to what parties it belonged.

A. No, sir; at the time I didn't know to what individual parties it belonged.

Q. You didn't know whether it was on Killinger's or Hoyt & Sherman's, or Barnes & Co.?

A. No, sir; I didn't know who was the individual parties at the time; didn't know for some time afterwards.

Q. Will you state if you know what was done with the pork product that was then held by the National Bank?

A. It was in the possession of the Merchants' National Bank. At the time that we are now speaking of, and when we made this agreement, I think it was still in their possession to be

187 sold, and they to get the proceeds to apply on this note or notes which they held against Murphy & Co., or Miles Murphy & Co.

Q. Where was the stuff at that time?

A. I understood it was in the house of Culbertson, Blair & Co.

Q. Did you see it?

A. No, sir; never saw it; never was in the house.

Q. Something has been said on the course of the examination of the witnesses about a lot of hames at Duffield's smoke-house? Was there any warehouse receipts at Duffield & Co's for those hames or any receipt given for it?

A. There was.

Q. Who at that time held that receipt?

A. I held it.

Q. Was or was not the proceeds of the pork product held by the National Bank at the house of Culbertson, Blair & Co., sufficient to pay the notes which the National Bank held as security?

A. Ask that question again.

Q. Were the proceeds of the stuff with Culbertson, Blair & Co., which was held by the Merchants' National Bank, by those
188 warehouse receipts, or was it supposed to be sufficient to pay the notes?

A. It was supposed not to be snfficient.

Q. Was there or not any other paper or security in the hands of the Merchants' National Bank in addition to this pork product?

A. There was.

Q. What was it?

A. A mortgage given by a man by the name of Mix to the house of Murphy & Co.

Q. What arrangement, if any, was made between you and the Merchants' National Bank by its presd't, or otherwise, and the representatives of the firm Murphy & Co., with respect to securities which Blair held? State what was done.

A. The arrangement was that if those securities for those warehouse receipts which Blair held was taken up and the note cancelled, that I could take the mortgage as security upon monies which Murphy & Co. owed me.

Q. State how that was accomplished, if it was.

189 A. Mr. Blair was to apply the proceeds of the stuff in the hands of Culbutson, Blair & Co. to the payment of the note, and in addition to that I was to give him enough out of the Duffield hams to pay all that it lacked of paying, when they were delivered to the U. S.; that's my recollection of it.

Q. Was that done?

A. That was done; yes, sir.

Q. Do you know how much of the proceeds of these hams it took to pay the balance of the notes, were applied upon them, the proceeds of the stuff of Culbertson, Blair & Co.?

A. I don't recollect.

Q. About?

A. It was 3 to $5,000, I think.

Q. Did you make the mortgage?

A. I did.

Q. Have you made anything out of it?

A. I haven't succeeded in making anything out of it.

Q. Didn't Murphy & Co. at that time owe you a large sum of money?

A. Yes, sir.

190 Q. About how much?

By Mr. Roberts.

Are you speaking of Miles Murphy & Co.?

A. The two was so near, only I don't know which is which, hardly.

Q. Answer the question.

A. They owed me, I think, at least $4,000.

Q. Did you at that time ask for any settlement—any final settlement with that firm of Murphy & Co. at the time of this dissolution you have just been speaking of? Did you arrive at a final settlement with them when you were here, shortly after B. F. Murphy had gone away?

A. Well, it was what we considered very near a final settlement; I don't know whether it was directly final or not; it was the great bulk of the settlement, as we understood it; I can't recollect whether it was a final settlement or not; it was as near as we could get it.

Q. Did you know, even then, after all this business had been transacted, what particular lot of or product Culbertson, Blair & Co.

191 had got, or the Merchants' National Bank had got, upon their notes?

A. No, sir, I did'nt; I did'nt know that for some time afterwards.

Q. Did you see Killinger in Des Moines subsequently in the year 1865?

A. Yes, sir.

Q. I ask you if you made any effort to find B. F. Murphy after you got here?

A. Yes, sir; I made all the efforts I knew how to find him.

Q. Did you find him?

A. I did'nt at that time.

Q. Had you seen him up to the time you saw Killinger in June?

A. I ain't positive whether I had seen him or not, when I saw Killinger.

Q. Did you find him when you went down south?

A. No, sir; I missed him all the time.

Q. Did you see him at all, until you came back here?

A. No, sir; I did'nt. I think I saw him first in Des Moines. I ain't right positive, though I know I missed him. I went to Rich-

192 mond, Va.

Q. Did you have any conversation with Killinger at Des Moines in respect to this matter?

A. Yes, sir.

Q. About what was that conversation?

A. The substance of it was, as near as I can recollect, that I told him I was very sorry for him; that I would do evreything I could to save him; that I felt as sorry for him as I did for myself, and that if I could get my pay he should have his; his claims should go on the same footing as my own; also I would help B. F. Murphy to start

again, and I thought he was sharp enough to go and do business again and pay all his debts. That was my idea.

Q. Did you say to him that B. F. Murphy had gone away, with a large amount of your money and his?

A. I don't recollect saying anything of that kind. I might have said he had some of my money, but I certainly did'nt say he
193 had any of his, because I did'nt know of any such thing.

Q. Have you ever, to your knowledge, received any of the proceeds of the pork of the pl'ff, Killinger?

A. None that I know of.

Q. Did you, in fact, get the benefit of this rebate on the commission which had been allowed to you by Murphy & Co?

A. I did'nt. When the parties lost through the house here—thought it had been allowed me, they would'nt allow—they only allowed me, in settlement with them, the one per cent. which I paid, and the commission; I got none of it, only on my own stuff.

Q. Only on your own product?

A. Yes, sir.

Q. State whether it was any part of that agreement with Killinger, in respect to shipping or packing, or packing or shipping of their hogs, that they should be shipped to B. F. Murphy?

(Q. Objected to.)

Q. State what, if anything, was said as to the manner in
194 which it was to be shipped from Des Moines.

A. All the instructions or understanding was, it was to be shipped the same as my own.

Q. You have stated in your examination that your instructions were that the profits of the pork shipped from Des Moines, upon which you made advances, should be deposited to your credit in the Union National Bank. Was there exception on the part of any of the parties who packed with you at Des Moines, excepting Killinger?

A. No, sir; no exception.

Q. Was there any authority given here to pay any of those parties any of the profits of their sales?

A. No, sir; there was no authority given to pay any one anything.

Q. Did you know of any such payment having been made at the time?

A. Not at the time, until after we came to make the settlement.

Q. In this fragment of a letter that has been introduced
195 here you speak of a lot of shoulders and hams and sides still remaining at your pork-house. State what, if any, explanation you desire to make in relation to that?

A. At the time of writing this I supposed there would be a market for hams and sides at Des Moines; but it turned out afterwards that there was not, and I shipped everything we had to Chicago, with the exception of a frozen lot of meat, which was not cured; this lot as well as the balance.

Q. Was there any of this Killinger meat in the packing-house at the [the] time this was written?

A. I think not.

Q. State how near the time of packing on your own account, and on account of these other parties, took place; which was first?

A. Well, the packing for others first, mostly. We bought hogs after the others got through; ours was packed last, generally, I think nearly all.

196 Q. The stuff mentioned in the letter, you say, was subsequently shipped to Chicago, except—

A. Everything was shipped to Chicago, except a lot of frozen hogs.

Q. Shipped in the same way as the others?

A. Shipped in the same way as the others; yes, sir, all alike; we shipped over three roads.

[*Cross-examination.*

By Mr. Roberts:

Q. Have you a memorandum with you now of the deposits which were make to your credit in Coolbaugh's Bank by Miles Murphy & Co., or by B. F. Murphy, along through January, February, March and April?

A. I have not.

Q. As the sales of the Des Moines pork was being made from time to time, did you have any report of it?

A. No detailed report. I would have a letter stating, for in-

197 stance, so many pieces were sold of shoulders, sides or hams, or lard, frequently; but there was no account made out at all, I think, until it was all wound up.

Q. Who did you receive this general statement from? Were they by letter?

A. They were by letter, I believe, mostly.

Q. Who from?

A. Most all were from B. F. Murphy.

Q. Did you ever have any correspondence with Miles Murphy & Co. through January, February, and March, previous to the time of Frank Murphy's leaving, with respect to the Des Moines pork?

A. I might have had some; I didn't know positively; most of it was with B. F. Murphy; but 'tis very likely I had some correspondence with the firm, but the larger portion of it was with B. F. Murphy.

Q. Who made the bargain with Miles Murphy & Co. with reference to this one and a half per cent. which you were to get for advances?

198 A. B. F. Murphy, I suppose, made it.

Q. You suppose so?

A. Well, I know I didn't make it.

Q. You didn't make it personally?

A. No, sir; if anybody made it he made it.

Q. Did you authorize him to make it?

A. I don't know whether I authorized or consented after it was made.

Q. You consented to it after it was made? You cannot now remember whether your authorized him to make it?

A. No, sir, I cannot.

Q. You say you made all those advances of money to these parties yourself?

A. Yes, sir.

Q. Did you allow Frank Murphy to make a bargain on your behalf as to what compensation you should have without authority?

A. Well, sir, he made no bargain but what any commission house in the city would do. There was nothing special about the bargain particularly. I had offers from three or four others.

199 Q. Was'nt a particular bargain made?

A. I don't know there was, only from what I have heard since I have been here. He told me that they would allow that if it was shipped there, and for me to try and send as much as I could.

Q. You mean during the progress of this trial you have learned it?

A. I don't know of any bargain being made, only from what I heard. I know they would do it on all shipments made.

Q. When did you hear of the bargain?

A. I did'nt know there was any bargain made, I say.

Q. You did'nt know that Miles Murphy & Co. made a bargain to sell that for two and a half per cent., and give Murphy one and one-half per cent.?

A. There was no bargain giving Murphy and Allen half of it.

Q. How do you know that, you was not there?

A. Only from what he told me.

Q. Didn't you learn when you came down here, in the con-
200 versation with Robt. Murphy after Frank Murphy had absconded, that such a bargain had been made on behalf of Murphy & Allen to Frank?

A. We talked together. He said I was to have it, but there was grumbling about it all the time. I don't think it was understood Murphy & Allen was to have it. I know it was not with me.

Q. When did you first learn anybody was to have that one and one-half per cent?

A. I don't know when it was before that. I don't recollect when I learned it.

Q. Who communicated the fact to you?

A. B. F. Murphy.

Q. The whole of the correspondence in that regard was with him exclusively?

A. I don't know whether there was any correspondence or not, or whether I learned it by letter or person.

Q. When did you see him other than during that visit here
201 January, February, or March?

A. I think I was in Des Moines several times, but I ain't certain.

Q. After the pork season commenced?

A. I think so.

Q. Was he there when this bargain was made with Miles Murphy & Co. about this new commission?

A. I think he was there during the winter several times.

Q. Was this bargain made before you commenced packing at Des Moines, or after?

A. I do not recollect. It was made before we shipped any.

Q. You cannot state whether you learned of that bargain from Frank Murphy, personally, or by letter?

A. No, I do not; I cannot tell which way it was.

Q. Have you not reflected upon that matter before this time, with a view of ascertaining in your own mind how you had learned that fact?

A. I have not; no, sir.

Q. Have you been looking up letters which you received
202 from Frank Murphy during that time?

A. I have not.

Q. Hav'nt any curiosity to hunt any of them up?

A. No, sir; because I didn't think any one would suppose Allen & Murphy had anything to do with the commission, because we had'nt any money in it. Didn't suppose there was any such a thing thought of.

Q. When you came down here in April you took those commissions?

A. I told Robert Murphy to make out the account in some way, and get it off his books, I didn't care how; and he made it out, charging everything just as he pleased, so I could get the statement in my pocket and go home. The fact that he charged and credited Murphy & Allen had nothing at all to do with it, so far as I was concerned. I took any settlement he might make.

Q. No matter how it came?

203 A. Yes, sir; to get a settlement and go home.

Q. Didn't you take care not to take commissions on Killinger's hogs?

A. They were not offered to me.

Q. Why was there any difference made by Robert Murphy at that time in making up the account?

A. He said I was not entitled to it, as I had not advanced anything.

Q. He said you were not entitled to a commission on the Killinger pork, as you hadn't made any advances on it?

A. Yes, sir.

Q. Where was that conversation with Robert Murphy?

A. I suppose in their office.

Q. Who was present?

A. I do not recollect.

Q. You did not get a commission on Killinger's pork at that time simply because Robert told you you made no advances on it, and was not entitled to any?

A. I think that was the way it happened, there was so many conversations and so much confusion about it. I was wanting to
204 get at a settlement in some way and get away. I had not been home for a long time, and wanted to get it off my mind.

Q. How did Robert Murphy know that you hadn't made any advances to Killinger?

A. I don't know how he knew it.

Q. Did he know it?

A, He seemed to know it.

Q. He seemed at that time to know that you had not made any advances to Killinger. Had you ever sent to him any statement of the amount of advances you had made to Barnes, and Cook, and Sipher, and Sherman, and to Hayes?

A. No, sir.

Q. He seemed to know that you had made advances to all the other Des Moines people except Killinger?

A. That is the way I understood it.

Q. He would not allow you to have this commission on Killinger because you had not made any advance?

205 A. My recollection is this. I may be mistaken. He made out the statement of each individual; for instance, to Sipher, and Barnes, and others, whoever might have packed there, and allowed me one and a half per cent. commission. In making out my account, for instance, one and one-half, on Barnes & Co., one and a half on Sherman, and so on, he footing the thing up in my account at so much. That is my recollection about it.

Q. Who wanted to shoulder the whole of Killinger's debt?

A. I do not recollect what was said about Killinger's debt. My recollection is that there was very little said about it. I didn't know but what it was settled. After thinking of it as much as I can I have some understanding that Killinger's account was not mentioned any more than of the commissions on it.

Q. You did not inquire, or do you know whether Killinger

206 had been paid for his hogs?

A. I don't remember inquiring; I don't think I did.

Q. It didn't occur to you to find out whether Killinger had got his pay?

A. That is my recollection.

Q. When Robert Murphy refused to let you have the commission on Killinger's property was there nothing at all said of the fact that the concern owed Killinger several thousand dollars?

A. There might have been; I don't know; I cannot now recollect about it. I don't think there was much said about the commission or anything, because I did not care whether the commission was much or little. It made very little difference.

Q. Did you ever find out the truth about the four thousand dollars and upwards on that Killinger pork, which was sold at Culbertson, Blair & Co.'s warehouse.

A. I never found out only as my attention was called to it.

207 A good while after that settlement they had forgotten to charge me with that stuff, and it ought to have been charged.

Q. Who forgot to charge you?

A. Murphy & Co.

Q. Forgot to charge you with the Killinger stuff? Why would they charge you with the stuff?

A. I don't know. They had the privilege of charging that if they had a mind to.

Q. Would they charge you with any debts I might owe you, or any other outsider?

A. I cannot give any reason why.

Q. Didn't you a year after this transaction, in April, 1866, have credit entered on the note of Murphy & Co. given you for this four thousand dollars of this Killinger pork sold by Culbertson, Blair & Co. by your order?

A. There was credit entered on the note, I think.

Q. Who entered it?

A. I don't know whether I did or Mr. Jewett.

Q. It was a note Murphy had given you?

A. Yes, sir.

208 Q. That was after this suit had been brought?

A. I don't know when the suit was brought.

Q. You don't know when the suit was brought?

A. I did not know until after the notice had been served upon me.

Q. Did you know before that?

A. No, sir.

Q. Did not know that a suit would be brought?

A. I did'nt know; I did'nt have any idea of it.

Q. Did you make an arrangement?

A. I did not know it five minutes before. I was talking with Mr. Killinger in their office, talking of getting some kind of a settlement, and I told him, I had'nt any offer to make. He wanted to go and talk it over when the constable of sheriff served a notice on me.

Q. Had'nt you made an arrangement that Killinger or his counsel, who should not be informed of your presence in the city here?

209 A. I had no arrangement.

Q. None whatever?

A. No, sir. I was in this city a great many times; for several days and stopped at the Tremont house, and had my name registered there.

Q. When was the credit entered on the note?

A. I don't know; the note will show.

Q. Do you remember whether it was before the suit or after it?

A. I don't know when it was.

Q. What makes you think Mr. Jewett entered it?

A. The note was in his hands; I don't know whether he did or not.

Q. Do you know whether the credit was ever entered on the note?

A. I think there is a credit on the note.

Q. What is that for?

A. I don't recollect what it is for?

Q. You say you don't recollect it was for this pork of Killinger, that was sold by Culbertson, Blair & Co.?

A. They brought in an account that we had settled.

Q. Who is they?

210 A. Murphy & Co., and I think they said it was for stuff of

Killinger's that they had overlooked in some way or other. I don't recollect the circumstances. They charged me with it, on my account, on their account.

Q. They charged you in April, previous, 1865?

A. I believe that is the time it is charged, April 1866, ain't it?

Q. No. 1865?

A. No, it ain't charged in April 1865, it was long after the settlement I think. That is my recollection about it. I don't know anything about it. I think the whole thing was settled; but don't know anything about it more than you do.

Q. Settled with whom?

A. Murphy & Co., between me and Murphy & Co.

Q. How came this credit to be entered on this note?

A. They charged it to me on their books, and I credited it to them on this note.

Q. You state to the jury, you cannot remember whether the
211 credit was made before or after this suit was brought?

A. The trouble is, I don't know when the suit was brought?

Q. In the fall of 1865.

A. It was credited, I think, before I knew it was brought.

Q. Before you knew the suit was brought, you think it was credited?

A. Yes, sir.

Q. Was it credited after you had seen Killinger up there in June 1865, and had this talk with him?

A. I could tell you better if I knew where it was credited.

Q. You cannot remember whether it was credited in the year 1865 or '66?

A. I have told you two or three times, I did not know when it was credited, and I cannot tell you, I cannot recollect dates; if I had prepared myself I should have looked; I have come here from New York and have got none of these dates in my head. You may think I don't want to answer, but I tell you I don't know dates.

212 Q. Was Robert Murphy present when that credit was made?

A. He might have been.

Q. Search your memory and state if you don't remember that Robert Murphy was present at the time the credit was made.

A. I suppose the note could be got and shown when it was, if you want it.

Q. I would like to have it. Didn't he particularly state at the time that credit was made, that he did not recognize Killinger in this transaction at all, and that he did not consider that he had any right to enter up a credit on the note to them?

A. My recollection is, he stated he did not care who got it, whether he owed Killinger or me.

Q. Didn't he state to you at that time also that Miles Murphy & Co. did not know Killinger in this transaction, and only knew Murphy and Allen?

A. I don't recollect that he made any such statement.

Q. You assumed the indebtedness of all of these parties in
213 your settlement with Miles Murphy & Co., except Killinger, did you not?

A. I did in one sense of the word. They owed me for the stuff, and they had me—had to settle that way.

Q. Killinger owed you some eight hundred dollars for packing?

A. He owed me for packing, whatever it might be.

Q. He owed you?

A. Yes, sir.

Q. Did you not render him, while he was up there in June, these two accounts? (handing papers to the witness.)

A. They are in our book-keeper's handwriting, and I suppose they are correct; don't know to the contrary at all.

Q. I see that you credited him there with fifty-three sides.

A. Yes, sir.

Q. Who did you get that from?

A. I suppose it came from the statement of Murphy & Co. I don't know; I could not tell you.

Q. Why did you credit him with two hundred and sixty-
214 seven 12-100 dollars?

A. I think, as near as I can recollect, it was some sale that was made. Probably in selling somebody else's stuff, this was put in to make the number out. I don't recollect, but I think that would be it. I did not keep the books, and this pork business is an outside operation, and the details of it I ain't as positive about as you might think I ought to be. I cannot tell particulars of this kind, but I would suppose that was the way it came.

Q. What is the balance of your account against him?

A. It shows five hundred and thirty-two dollars and ninety-nine cents. ($532 99.)

Q. Did you ever demand that from him?

A. Not in a legal point of view. I told him he owed us. In this conversation we had in Des Moines when he came out there
215 wanting a settlement, I told him that in consideration of his having met this misfortune, that for the present I should not ask him for it; that I would try and help him collect all I could, and if we ever got it we would collect it. I never demanded it legally, but always told him he owed it.

Q. In consideration of the fact that he had lost this amount, you would not demand it from him?

A. That was what I thought about it. I don't know whether I told him so or not.

Q. Why should you be giving him that five hundred dollars, if you hadn't anything to do with the selling of the pork?

A. Because I thought he had been unfortunate; that is the reason.

Q. Do you befriend every unfortunate man?

A. I befriend a good many of them, as you will find if you go to Des Moines. I befriend a good many, and help to carry
216 them through, as I tried to do B. F. Murphy. Mr. Sipher is a specimen.

Q. You have an arrangement with reference to these Duffield smoked hams, for the sale of them to the government through Culbertson, Blair & Co. ?

A. Did I have an arrangement?

Q. Or did anybody ?

A. I understood they were to go in on the contract that had been made by Culbertson, Blair & Co.; that Murphy & Co. or B. F. Murphy or some other person was to furnish half of it; that the sale was already made.

Q. Did you ratify that sale when he came down ?

A. I don't know whether I ratified it. It was all made, and they had the hams.

Q. You had a receipt for the hams, hadn't you ?

A. Yes, sir.

Q. The hams were not delivered to any one when you had the receipt ?

A. No, sir; they were not delivered.

Q. Where did you get that receipt ?

A. B. F. Murphy gave it to me.

217 Q. When and where ?

A. I passed through here the last time. Well, I don't know when now; it was a few days; it was the last time I went through in going home.

Q. How long was that before Frank Murphy absconded ?

A. It was only three or four days, I guess.

Q. How came you to take that warehouse receipt ?

A. I was on my way home, and he gave it to me.

Q. What did he give it to you for ?

A. He said the stuff was mine, and he gave it to me, and that is all I know about it.

Q. Did he tell you he was going to run off ?

A. No, sir.

Q. Why should you be taking that warehouse receipt to Des Moines ?

A. I didn't take it to Des Moines; I think I left it at Coolbaugh's. I know I didn't take it to Des Moines.

Q. About how much pork did that receipt represent ?

218 A. I don't recollect; that sale of Culbertson's will show.

Q. That was the whole of it ?

A. I don't recollect whether it was or not; might have been more. It was all they had, I know.

Q. Did he tell you there was seven hundred Killinger's hams in there ?

A. No, sir.

Q. Didn't tell you whose it was ?

A. No, sir; I don't know whether he told me whose it was. I know he did not tell me it was Killinger's.

Q. He told you it was yours ?

A. This was my understanding.

Q. You understood it to represent the Des Moines meat ?

A. Yes, sir.

Q. Did he say anything about the pork in the warehouse of Miles Murphy & Co.?

A. No, sir.

Q. And other Des Moines pork?

A. No, sir.

Q. Why didn't you ask him for warehouse receipts for them?

A. Because I considered it was safe enough where it was.

Q. Why did you take the receipt for the Duffield hams?

A. He gave it to me without my asking for it.

219 Q. What did he tell you?

A. Here was a receipt he had put in there, and he wanted me to have it.

Q. Why didn't you tell him you was going to Des Moines, and could not attend to the business?

A. I don't know what I told him, but he gave it to me. I don't recollect what the conversation was?

Q. When did you first find out the seven hundred Killinger's hams were in that house?

A. Yesterday.

Q. The first you ever saw?

A. The first I have ever heard.

Q. Didn't you find it on the account of Murphy & Allen that Robert Murphy had given you?

A. I don't know. I haven't got there accounts with me. When I came here I did not expect to be on trial; I understood it was not until May, and I have not got a single account with me, and have not looked at them in six months.

220 Q. State why you credited Killinger with these fifty-three sides. two hundred and sixty-seven dollars and twelve cents, and did not credit him with the seven hundred hams? Were they not got at the time, in the same account?

A. I cannot tell why. If I had the account here, I might tell why, but I don't know why the credit was made now.

A. You stated in your direct examination that you never thought you knew of receiving any of the proceeds of Killinger's pork.

A. Yes, sir.

Q. If there were seven hundred of Killinger's hams in that Duffield pork-house, you got the proceeds of them?

A. I don't think I did, because I had paid more out than I got.

Q. Didn't you get the proceeds of the sale of these Duffield hams?

A. I got part of it.

Q. You got about nine thousand dollars?

A. I got all; I did not pay to the Merchants' National Bank.

221 Q. If Killinger had seven hundred hams in there, who were they put in there by?

A. I don't know. I don't know anything about it, only as I told you; when the receipt was given me, I didn't know what Des Moines stuff it was. I didn't suppose Killinger had anything to do with it, because I didn't suppose I was handling the Killinger stuff in any way, shape, or manner.

Q. You never found out that Killinger's meat was there?

A. Only what I have learned from statement.

Q. What statement do you refer to?

A. The statement here; I have not looked at the account; I could only tell from the account given me; and since we settled two years ago in Des Moines, I have not looked at one of those accounts, never.

Q. Who gave you the amount of two hundred and sixty-seven dollars and twelve cents for the fifty-three sides?

A. I don't know who gave it to me at all. I suppose it came
222 from the house of Murphy & Co.; that would be a reasonable supposition.

Q. When this receipt of the Duffield hams was given to you, did Murphy tell you they had been put in on the contract of the government?

A. Yes, sir.

Ques. You held that receipt, and allowed Culbertson, Blair & Co. to put them on the contract, and sell them?

Ans. Yes, sir.

Ques. That receipt which you held entitled you to draw the proceeds, did it not?

Ans. That was my understanding.

Ques. Is not that the fact?

Ans. Yes, sir.

Ques. You did draw the proceeds? A part of it you say?

Ans. I drew the balance. I never drew any only the balance, after paying the Merchants' National Bank.

Ques. Didn't you take the freight bills from Mr. Robert Murphy or Robert and L. E. Murphy, to get demurrage or freight back from the railroads?

Ans. I think we did.

223 Ques. Did you have a contract with the railroads with reference to this Des Moines pork as to what rates they should send it for you?

Ans. There was an agreement. I don't know whether it was in writing.

Ques. Look at that abstract of shipments, and see if there is an abstract showing the amount of freight on Killinger's pork and lard.

Ans. The heading don't say. It says what the amount of freight should be, but not what it is.

Ques. Who is the paper made out by?

Ans. I suppose it came from my house.

Ques. The house of Murphy & Allen?

Ans. Yes, sir.

Ques. At Des Moines?

Ans. Yes, sir.

Ques. What is the meaning of that heading, "What the freight should be"?

Ans. I don't know what it means; whether it means that this is

what ought to be paid or what we ought to pay or not. I don't know what it means.

Ques. Why did you take these way-bills or freight-bills
224 from Murphy and Co. to get a rebate?

Ans. I think we got five cents a hundred, whatever it was.

Ques. The railroads had overcharged, had they?

Ans. No, sir, they had not. It was an agreement they should pay us so much.

Ques. Who made the agreement?

Ans. I don't know.

Ques. Did you?

Ans. I don't know whether I did or not?

Ques. Search your memory about it.

Ans. I could not tell.

Ques. Did you get a rebate?

Ans. We got some. One of the roads would not give back any: but we got some—some from the Rock Island road, and a little from the other.

Ques. You cannot remember whether you made the bargain for the freight, or not?

Ans. I don't know.

Ques. Is your memory bad?

Ans. It is bad when I don't try to remember, when it
225 gets off my memory. I have got so much business. If the thing is settled, my memory of it is bad. P. F. Murphy and I might have made it.

Q. Did you get some abatement?

A. Yes, sir.

Q. Can you state how much?

A. It was not much. I expect the books of the Rock Island R. R. would show, and the C. B. Q. Those two roads were the roads. It is not much. One road would not rebate anything.

Q. You got rebated on Killinger's as well as the rest?

A. I don't know. I suppose so. It depends on which road it went over.

Q. What did you do with the money?

A. I don't know. I suppose I kept it.

Q. Haven't you given him credit on his account?

A. I think not.

Q. Why?

A. I don't know why; don't know any thing about it. I
226 don't know whether he was charged any more than we got either, and might not have been charged. It is a custom, here in this city, which you can learn, to get a rebate. There is nothing wrong about it. Every commission house in this town gets a rebate from large shipments, which you can find out by asking.

Q. With reference to these commissions, you were to have one and a half per cent. on these commissions in consideration of having made advances to these parties, as you understood it; that is correct?

A. I was to have it because we didn't draw on it. If we had drawn on it, it would not be allowed. If we had shipped to them and drawn, they would not have allowed us any commission; but on condition of their getting that much stuff without having any money to pay on it.

Q. I may have misunderstood you. As I understood you,
227 the arrangement was made with Miles Murphy & Co., that they should only have one per cent. of the two and half per cent. which was charged, and you should have one and a half of it in consideration of the fact you were making advances to these parties; was that correct?

A. I don't know whether it was the fact of my advances. It was to get business, and they didn't have to advance anything on it.

Q. It wasn't, then, because you were making advances, but to get the business you could put into the house?

A. It didn't make any difference to them about my advancing to the parties in Des Moines.

Q. If that was not the case why did Murphy insist you should not have any Killinger commissions because you hadn't advanced?

A. I don't know; I couldn't say.

Q. You put in yourself, there, didn't you, 3,860 hogs Murphy & Allen?

228 A. I suppose that abstract is correct.

Q. That pork came here for sale?

A. Yes, sir.

Q. That agreement as to commissions applied to Murphy & Allen's pork as well as the rest?

A. Yes, sir.

Q. So far as Murphy & Allen's pork was concerned, that agreement was not with reference to the advances to be made to these parties, couldn't have been?

A. I don't know as the reason was in the advances. You may call it what you mind to. They were getting that much stuff without having to advance on it. It was for that purpose.

Q. It was because they were getting that stuff themselves. Miles Murphy & Co. were getting from your partner, or Murphy & Allen, a large quantity of stuff to sell, on which they were not to make any advances; is that what you mean to be understood?

A. I don't know what their understanding was; but I know that I was to get, individually, one and a half per cent.

Q. Had Frank Murphy any authority to make this bargain?

229 A. I don't know whether he had or not.

Q. Did Miles Murphy & Co. advance all these freights?

A. I suppose they did. I know I didn't.

Q. Wasn't all these freights charged to Murphy & Allen on all this pork from Des Moines?

A. I think it was.

Q. Was it not in the account that was handed to you?

A. I suppose it was.

Q. Did you object Killinger's freight then?

A. I don't think Killinger's freight is charged to me.
Q. Have you any recollection about that?
A. I don't think the Killinger freight is charged to me.
Q. Isn't all the freight charged by Murphy & Allen, as they paid it?
A. I don't know how it was, as they paid out. In the account rendered me I think it is not on.
Q. You feel confident of that.
230 A. I can't feel very confident of anything in the book line without looking at it.
Q. This indebteness which you say this house owed you when you came down here in April to settle, was not the indebtedness to Miles Murphy & Co., was it?
Q. Where was it, if not?
Q. Was it not indebtedness of Murphy & Co?
A. Well, I confound the two together.
Q. Was Miles Murphy & Co. interested in these wool transactions?
A. I don't know about the wool transactions as far as he is concerned.
Q. You were a partner of Murphy & Co., in that wool transaction, were you not?
A. No, sir.
Q. You advanced them money?
A. No, sir.
Q. Did'nt they owe you, growing out of that transaction?
A. Not for money advanced on wool.
Q. What was it for?
A. They bought wool for me and I paid them; but I was not in partnership with them.
231 A. However, the fact might have been, it grew out of transactions between yourself and Murphy & Co., growing out of wool.
A. Which?
Q. This large indebtedness which you found in April, 1865?
A. Part of it did.
Q. Didn't the largest part of it?
A. I think not.
Q. What did Miles Murphy & Co. owe you for?
A. For pork sold.
Q. This Des Moines pork?
A. Yes, sir.
Q. Nothing else?
A. Except wool.
Q. Miles Murphy had nothing to do with you in respect to wool?
A. I gave them an order to buy a large amount of wool, and they bonght $50,000 worth and I gave them $50,000.
Q. You understood Miles Murphy was not interested in the transaction?
A. He was not interested in the transaction because it was my own wool.

Q. Was it Miles Murphy & Co. that got that money, or
232 Murphy?

A. I don't know which got it; neither of them got the money, because we bought the wool with it.

Q. Who bought it; was it Miles Murphy & Co., or Murphy & Co.

A. I understood Miles Murphy was not a member of the firm; my impression is, when I bought the wool that Miles Murphy & Co. was the firm, but I am not certain; I don't see as it makes any difference, because I furnished the money, and it is not a partnership concern—not the wool transaction you think of; this was done as a commission and not as speculation; they bought as commission merchants for me.

Q. I understand you to say you were not advised that Barnes and Cook and the other parties drew any money during the winter?

A. I think not.

Q. Didn't you know they were down here?

A. Yes, sir.

233 Q. What were they doing here?

A. They were counselling, I suppose, as to the sale of their other stuff here, what was best to be done.

Q. With your partner, Frank Murphy?

A. I suppose they talked with him; I was not here and could not tell.

Q. You wasn't here at any time while any of them were here?

A. Yes, sir.

Q. Who was here?

A. I think I saw Barnes here; I don't know whether I saw the balance or not.

Q. Didn't you know Barnes had gone into a corn speculation?

A. I didn't know it until after the failure of Murphy & Co.

Q. Then you found there was $4,000 of money that Barnes had lost?

A. They hadn't lost it, because the speculation wasn't out; Robert Murphy said he was going to charge him up with it, or had, because he expected he lost.

Q. You allowed that?

234 A. I couldn't help it.

Q. Why not?

A. It was all done; they had failed.

Q. You had to assume it?

A. They had a margin kept to pay it to me.

Q. Why did you assume it?

A. I didn't assume anything; I took the accounts as they gave them to me.

Q. Didn't you finally settle with Barnes?

A. Yes, sir.

Q. You settled it upon the basis of that $4,000?

A. There was no basis about it; I gave them the balance of the money coming to them, and they allowed this—they grumbled at it, but allowed it; I had no authority for allowing it.

Q. You shipped their pork just as you did Killinger's?

A. Yes, sir; all alike.

Q. Why did you not assume Killinger's as the rest of it?

235 A. Because when it got here, he took charge of it himself.

Q. That was the reason?

A. Yes, sir.

Q. What charge did he take of it here?

A. Why, he took all the charge he could, and told what to do with the money, taking the proceeds when it was sold; and I didn't consider I had anything at all to do with it any more than you have now.

Q. That is for the jury; you say he took charge of it. I want to ascertain what you understood to be his charge; who did you learn that from?

A. I think I learned it from B. F. Murphy.

Q. That he had given orders to deposit this money to his credit in the Fifth National Bank?

A. Murphy said Killinger had been here and made certain orders in relation to his pork, about the price and about the proceeds; and I told him that whatever Killinger said, to do it, and that all I

236 claimed we had against it were packing charges, and he was perfectly good for that, and to let him have the charge of it; I didn't want to have anything to do with it; I had no claim against it further than the charges, and he was good for it; and I considered he had the charge of it.

Q. Didn't you understand he had ordered the proceeds to be placed to your credit?

A. No, sir.

Q. Never understood that at all?

A. Not after Murphy told me he had drawn $4,000 of it and had given orders to place it in the Fifth National Bank.

Q. What difference was it to you where his money was placed? What difference could that make to you? Did it make any difference in respect to your relation whether he threw the money into the river or placed it anywhere else?

A. I thought by taking the money he was taking the thing

237 out of my hands, and I had no further settlement to make with him.

Q. What was your idea about it? He had the right to take the money hadn't he?

A. I don't know anything to the contrary.

Q. Did you conceive in your mind it made any difference whether he took the money from you at Des Moines or from your partner Murphy at Chicago?

A. I conceived in my mind when he came here and took charge of his meat that my liability or control over it—I didn't consider I had anything to do with it, and if I had gone to Murphy and told him to give me the money they would not have done it.

Q. How do you know they would not have done it?

A. I don't think they would.

Q. Don't you know that Frank Murphy, on the 4th of April, did deposit to your credit over $1,200 of Killinger's money?

A. I don't know any such thing.

238 Q. Have you never examined the accounts to see that?

A. I don't think I have.

Q. If that would turn out to be the fact you would be mistaken in your opinion whether Frank Murphy would not have paid you the money?

A. Any one is liable to be mistaken. My opinion was on the subject, and is now, if a person comes and takes charge of their stuff and you have no claim against it, that they assume all the liability of it.

Q. Didn't Barnes come down here and see how their stuff was going?

A. Yes, sir; but they had no authority draw any money.

Q. You recognized Barnes' authority afterwards?

A. No, sir; I never recognized it.

Q. But he drew $4,000, and you charged it to him ?

A. The account; when I got back after the firm had failed I found that was charged in it.

239 Q. Didn't you charge it to Barnes?

A. I settled with Barnes and just paid him the difference.

Q. You saw it was $4,000 the Murpheys were holding of his money?

A. Whatever the amount was I saw of course, but I didn't recognize, and hadn't anything to do with it.

Q. You didn't insist upon paying it to Barnes twice?

A. There was no use in that, Barnes had already got it; lost it on the corn contract.

Q. You charged him with it, authorizing the Murphys in that way to withhold it.

Of course I did'nt authorize it. It was already done; I didn't know anything about it. I had no control over that charge more than you had; I found it on the account. There was a great many charges they objected to. The accounts were there and I got them and settled with the parties the best I could. If they hadn't

240 failed it might have been different.

Q. Did you ever make any objection to Robert Murphy to the account of in the name of Murphy & Allen of these freights and the commision on this pork.

A. I don't know whether I did or not. I know I didn't know it was kept that way until I came here.

Q. Why did you ship all this pork to Frank Murphy?

A. I don't know why I didn't do it until after the thing was all done at the house, but nobody seemed to know anybody but Frank Murphy, and I can't tell why that was.

Q. You didn't know at the time it was being so shipped?

A. No, sir. I didn't know it until after I came here and saw the way-bills. I supposed it was being shipped to the house of Miles Murphy & Co. or Murphy & Co.

Q. When did you first find out it was shipped to B. F. Murphy instead of Miles Murphy & Co.?

241 A. If my recollection is right it is when I came on after I found the failure. I think that is the first.

Q. You never were out at your packing-house while the stuff was being shipped?

A. Yes, sir.

Q. Didn't you see how it was being done?

A. I don't think I noticed. I never gave directions how the shipments should be made. My recollection is, it was coming to the house of Murphy & Co. I might be mistaken, but that is the way I thought about it.

Q. Why should that be if you understood your dealings were with Frank Murphy?

A. I don't know; I understood the dealings were to be with Frank. He was a salesman of the concern; he was the man I knew better than any of them. I knew him first as he was the man connected with me in the packing business and it was natural I should.

242 The balance did'nt attend to the selling and it was natural.

Q. Didn't you arrange with all these parties at Des Moines you would slaughter, pack, and ship it, and sell it for them in Chicago?

A. No, sir, I didn't. There was no contract for selling. They could all ship to any house they were a mind to.

Q. You did ship it yourself?

A. I shipped all I had advanced largely on myself?

Q. Did any one of these parties, on this abstract, ship it themselves from Des Moines, or was it all shipped by Murphy & Allen, or Allen?

A. Well it was. The house did all the shipping, I think.

Q. Your house?

A. I think so.

Q. Why did your house ship it?

A. I think it was the custom. I know it is with us to do the shipping; to load it on the wagon, and take the receipt of the transportation company for it, and then we considered the house was through with it.

243 Q. Didn't arrange with the parties to ship and have it sold here, and settle with them there?

A. No, sir.

Q. Did you expect the parties would come down here and settle with Miles Murphy & Co.?

A. I don't know what I understood at the time. I expected to get the money I had advanced. I supposed whatever was customary in such cases.

Q. Haven't you just stated that none of these parties were authorized to draw any money?

A. That is my understanding.

Q. You were to have it sold, and then to make the settlement at Des Moines.

A. I considered that the meat was held for the advances that was made; that was the way I looked at it. I was holding it as security.

Q. Selling it and holding the proceeds as security for your advances? That is what you understood.

Q. Yes, sir.

Q. When Killinger went up there in June, did you not
244 inform him you had seen Frank Murphy? In fact, hadn't you then seen Frank Murphy?

A. In June, I expect, I had seen him.

Q. Did you tell Killinger you had seen him?

A. I very likely did if I had seen him.

Q. Didn't you tell him Frank had his money?

A. I don't recollect telling him he had his money. I know I told him he had some of mine, but I don't think I used that term.

Q. Didn't you tell him that you were let out by reason of the fact that he had ordered his money to be put to his own credit in the Fifth National Bank?

A. I told him I considered I was out, and gave him the reasons.

Q. You think you didn't tell Killinger when you were down there, along in February, while the pork was coming in, that you had a chance to sell this to a government agent?

245 A. I do.

Q. Had there been any negotiations with Frank Murphy, or any government agent, with reference to the sale of pork?

A. None that I know of.

Q. Hadn't you already made a contract, through Culbertson, Blair & Co., with the commissary department for pork?

A. I think not at that time. The first I knew of it was in April.

Q. Your recollection is clear and distinct that you never had any conversation with Killinger with reference to the sale of this stuff?

A. With reference to the sale of it in Des Moines to the government agent, I am.

Q. In Des Moines, or to the government agent to be delivered at Des Moines?

A. Yes, sir; to be delivered at Des Moines.

A. I am to a government agent.

Q. Did you ever have any conversation with reference to the sale of it to a government agent to be delivered anywhere?

246 A. I don't know about being delivered anywhere. I have no recollection of it; but I know there was no conversation about delivering at Des Moines.

Q. You say that would have been absurd, and therefor you reason you never had any such conversation?

A. The reason is I don't recollect any such thing, and I think if such a thing had happened, I would have; but I have not the most distant recollection of stating it. That letter shows you my idea that there was a market west. If he had said there was a conversation about selling west, it might be so.

Q. You might have had some conversation with reference to a sale west?

A. I don't recollect any conversation but the other; I know I never had.

Q. Will you say positively no such conversation occurred?

A. I would.

Q. These warehouse receipts that the Merchants' National Bank, had you saw them? Didn't you?

A. I think I did.

247 Q. You say they were receipts of Miles Murphy & Co.?

A. That is my best recollection.

Q. Didn't one or more of them contain the indorsement of Murphy & Allen?

A. One of them did.

Q. How much was that?

A. I don't recollect the amount; it was not much. The note for which that had been given had been up sometime before; it was given by B. F. Murphy for an individual matter.

248 *Re-direct examination.*

By Mr. Jewett:

Q. Was that warehouse receipt by Murphy & Co. to Murphy and Allen?

A. My recollection is it was a warehouse receipt to somebody endorsed by Murphy and Allen.

Q. You didn't notice to whom it run on the inside?

A. No; if I noticed, I have forgotten.

Q. That was a transaction sometime previous?

A. Seemed to have been an old transaction—older one.

Q. I will ask you if these parties at Des Moines to whom you had made advances understood where their pork was in Chicago, who had the selling of it?

A. Yes, sir.

Q. Who did they understand had charge of the selling of the pork?

(Objected to.)

Q. In whose house and possession was it?

A. It was in the house of Murphy & Co., or Miles [or

249 Miles] Murphy & Co. Murphy & Co. I guess it was.

Q. You stated you were not familiar with the details of the shipping. Was it not the agreement, the arrangement, that all of this stuff should go to Miles Murphy & Co., or Murphy & Co., for sale?

(Objected to.)

By the court: I think the proper question would be what he did with his own?

Q. Answer that question. State the fact to whom it was shipped.

A. The stuff of our own was shipped and consigned to B. F. Murphy, and turned over to the house of Murphy & Co.

By the court:

Did you state to Killinger during any of these conversations in what way you were shipping this pork, to whom you were shipping it?

A. Yes, sir.

Q. State what you said.

250 A. I told Killinger we would ship our own to B. F. Murphy, or Murphy & Co. in Chicago, and that I thought Mr. Murphy

was a good salesman and the house stood well. I had taken pains to inform myself about the house, and every one told me it was responsible, and that I thought it would be as well with it as with any house in Chicago; there is where I was shipping my own and other stuff.

By the court:

You say you told him you was shipping to B. F. Murphy or to Miles Murphy & Co. Do you mean you told him you was shipping to the one or the other? You don't recollect which?

A. B. F. Murphy was the salesman of Miles Murphy & Co. He was a good salesman, and always got a top price, we understood.

Q. Do you remember whether or not anything was said about the house of Murphy & Co. in the conversation with Killinger?

251 A. I told him the house stood well and was responsible; a house of good credit. I told the others the same thing.

Q. You say you didn't know that the stuff was being shipped in the name of B. F. Murphy or to the name of B. F. Murphy until in April, as you remember?

A. That is my recollection. Yes, sir; I suppose it was being sent direct to the house of Murphy & Co.; that is what I thought about it.

Q. Why did you speak to Killinger or anybody else of B. F. Murphy?

A. On account of his being, I considered, a first rate salesman, and he had charge of the selling.

Q. Did you pay much attention to the details of the packing business at Des Moines?

A. No, I had no time. I had very little time to attend to it. I paid the bills; that is about all I done.

Q. Some inquiry has been made in the cross-examination in relation to this $4,000 that was retained by Murphy & Co. upon

252 a corn contract out of the proceeds of the meat. Did you have anything to do with allowing or disallowing that claim between Barnes and Murphy?

A. Of course not. I found it charged when the bill was presented to me. I had no control whether it should or should not be.

Q. Was it shown to Barnes as it was rendered on the bill?

A. Yes, sir.

Q. Did he agree to allow it?

A. He grumbled a little about it, and I asked him if he had'nt made the contract. He acknowledge he had. I said, "You can't back out." He said the time was not up. Says I, "Corn will not be any better, and you will lose it any way, and may as well give it up."

Q. He agreed to settle upon that statement?

A. Yes, sir; he did settle upon that statement.

Q. Was it so with the others, settling on the statement you got from Murphy & Co.?

253 A. Yes, sir; they all settled on those statements.

Q. Did Miles Murphy & Co., or Murphy & Co., make any advances, excepting payment of freight, upon any of the stuff shipped from Des Moines?

A. Not that I know of.

Q. What was the understanding as to the repayment of the freight?

A. It was to be repaid out of the first sales they made. That was my understanding.

Q. I will ask you again. Did you know at the time you were here in April, 1865, whose meat, out of which the particular lot of meat, the hams at the smoke-house, or the meat at Culbertson, Blair & Co's was made up?

A. I did not.

Q. You say you took the accounts as they rendered them, without being very particular. What do you mean by that?

A. Well, they made the accounts of the different parties out
254 and gave them to me, and I took them home just as they made them, supposing it was the best we could do. There was no use crying over spilt milk, and I took them just as they were, and went home. I would not say they were right or wrong; did not know whether they came out right or not.

Q. Did you know anything about how this stuff was charged upon the books of Murphy & Co., when the final settlement was made with the Merchants' National Bank?

A. I did not, at the time.

Q. Did you know whether or not that note was credited up to you, or any one, at the Merchants' National Bank that was credited up to you?

A. The amount was credited to me.

Q. Then, all the rest of this stuff that went to Blair was charged to you?

A. Yes, sir. They charged me with all the stuff, and credited me with the amount I paid on the note.

255 Q. Was it or not simply a method of adjusting the books?

A. It was about the only way they could square the books up.

Q. Does it show you got the proceeds yourself of any of the stuff thus disposed of?

A. I think not. It only shows they charged me with the stuff that was taken. The one offsets the other. They had to make an entry of that kind to square the books.

Q. Was that the stuff really charged to you on the books that went to pay their notes to the Merchants' National Bank?

A. Yes, sir.

Q. This $10,000 note was taken as the supposed balance due to you; that is, from the firm?

A. Yes, sir.

Q. How is it in relation to this credit that has been spoken of on that note?

A. Some time after we had settled Mr. Rob't Murphy, I
256 think it was, called my attention to it, that he found some stuff not accounted for, and come to look it up it was Killinger's.

Q. Was it stuff in the Merchants' National Bank?
A. Yes, sir. That was my understanding.
Q. It simply shows that when that amount was found and placed in the proper position, that the note was credited?
A. Yes, sir. They had given me a note for more than they owed me.
Q. Did you get the money that was credited on the note?
A. I got no money.

Cross-examination resumed.

By Mr. Roberts:

Q. There was placed to your credit $9,000 in the hands of the National Bank?
A. No; money from the taken from the warehouse.
Q. The whole amount of one transaction with the bank and
257 Culbertson, Blair & Co.?
A. No; it was two transactions entirely; it was managed at two different times; had no connection with it whatever.
Q. You got the difference, however, on the Duffield hams, did'nt you, in money?
A. Yes, sir; I got the difference.
Q. About nine thousand and odd dollars?
A. That account is correct, I think.
Q. You understand book-keeping, don't you?
A. Well, I am not a very good book-keeper; never kept books.
Q. You understand when a charge is made against you?
A. Yes, sir.
Q. I ask you whether that account of Robert Murphy, referred to Murphy & Allen, in account with Miles Murphy & Co., did not contain, as charged against Murphy & Allen, these seven hundred hams of Killinger's?
A. I don't know whether it does or not.
258 Q. You did'nt think to bring that account with you?
A. No, sir; I have not the account with me. I have come from New York; did not come from home.
Q. You never placed these accounts in your counsellor's hands?
A. No, sir; he has never seen them.

259 B. F. Murphey, called on behalf of the defendant, being duly sworn, was examined in chief by Mr. Jewett, and testified as follows:

Q. Where do you reside, sir?
A. Chicago.
Q. How long have you resided here?
A. About 4 years.
Q. What has been your business during that time?
A. I have been in the commission and packing business.
Q. What business were you engaged in Chicago, and with what firm connected in the autumn of '64, the winter of '64 and '5?
A. I was connected with the firm of the name of Miles Murphey &

Co., and temporarily they changed the name of the firm to Murphy & Co.

Q. Who composed that firm?

A. Miles Murphey & Co. was Miles Murphy, R. P. Humphrey, L. E. Murphy, and myself; Murphey & Co., Miles Murphey was left out in it.

Q. What was the style of the firm that was engaged in the packing business, and in the commission business in Chicago in the fall of '64 and winter succeeding?

A. Miles Murphey & Co.

Q. Had you any other business at any other place in the fall of '64?

A. Yes, sir; I had business at other places.

Q. Did you have any business at Des Moines?

A. Yes, sir.

260 Q With whom and what was the business?

A. Well, I am interested there in a packing-house with Mr. Allen.

Q. That was the firm of Murphey & Allen, was it?

A. Yes, sir.

Q. What was the business of the firm of Murphey & Allen?

A. Why, it was packing hogs there on commission, and buying some on our own account and curing them.

Q. When did that firm or that business start between you and Mr. Allen?

A. Well, I am not certain what year my brother and I built the house in the first place. I think it was in '60 or '61—I am not sure which—we built the house. I don't think Mr. Allen had any interest in the house. There was a man named Madrid, and Goodman and myself. Perhaps Mr. Allen had an interest with Madrid. I am not sure about it; he never was known to us.

Q. When did you first commence with Mr. Allen the firm of Murphey & Allen in that business?

A. I think the fall of 1863.

Q. You packed one year, then, before the year '64?

A. Yes, sir; that is my impression.

Q. Who owned the house in the fall of '64? the packing house?

A. Well, it belonged jointly to myself and Mr. Allen.

Q. You say they were purchasing and packing hogs?

A. Yes, sir.

Q. Had the firm of Murphy and Allen any money in the business?

A. I had not in '64, the fall of '64, or spring of '65. I

261 hadn't any money.

Q. Who made all the advances; furnished all the money?

A. Mr. Allen furnished all the money.

Q. What was Mr. Allen's business there apart from this?

A. Banking.

Q. Were you at Des Moines during the fall of '64 and the winter following?

A. I had flying trips. I didn't stay there any length of time.

Q. You were over occasionally?

A. Yes, sir.

Q. You did no packing, did you, there in barrels?

A. No, sir; we cured it rough; what is called a rough cure.

Q. What is called rough meat?

A. Yes; and what is called rough-cured; that included no cooperage, except for lard and grease.

Q. Who controlled the subsequent movements of the pork product after it was cured in this way for shipment?

A. Well, Mr. Allen controlled it.

Q. Do you know what parties, or for what parties was pork salted and cured at the packing-house in that year—that season?

A. Well, there I know several parties.

Q. Mention them.

A. There was Cook & Bond, Hoyt & Sherman, Sherman & Hayes. Sherman had some on his own account, and Sherman & Hayes had some jointly, and Mr. Killinger; likely there was some others; I don't just recollect now.

Q. Were any hogs packed there belonging to Murphey & Allen?

262 A. Yes, sir.

Q. I think you said that Mr. Allen purchased those hogs, and advanced all the money?

A. He paid for them, but I was interested in the profits and losses that might have come up afterwards.

Q. Did you have any understanding with Mr. Allen in the fall of '64, in reference to the house through which the selling of the pork packed at Des Moines should be made?

A. Well, we talked about that. Mr. Allen said that he could get the stuff sold here by good houses for one per cent.; that is, let the house charge 2½ and pay him back one, as making the advances, in consideration that there was not any drawing to be done.

By Mr. Roberts:

How is that sir?

A. He said he could get good houses to sell his stuff from Des Moines at one per cent. without drawing on it. I told him I would see our house and lay the matter before them, which I did, and we had quite a conversation over it, and they wanted more. Robert and Miles and Leander were all there, and I made the agreement. I told them [them] that they had better take it, and they agreed to do it for one per cent.

Q. I will ask you whether or not it is a common thing for commission houses to do business of that kind, at that rate, where they make no advances upon stuff consigned?

A. Yes, sir; I think so.

Q. Do you know of other houses doing it?

263 A. I cannot just say that I know; but I have heard of them. I cannot say that I know positively.

Q. Well, sir, to what house did the product of the Des Moines packing house principally go for sale during that year?

A. We put it through the house of Miles Murphy & Co.
Q. Was Murphy & Allen's stuff sent to that house?
A. Yes, sir.
Q. Where was it placed here in Chicago?
A. Placed in their packing-house.
Q. Whose packing-house?
A. Murphy & Co's., or Miles Murphy & Co.
Q. When did you first know the plaintiff in this case?
A. Well, it was sometime, I think, after we had notice that the meat had arrived from Mr. Killinger. He went to the house, I think, in the first place; and I think that L. E. Murphy was at the house. He said there had been a man by the name of Killinger there, who said that he had some stuff coming into our house, and and Mr. Killinger came down to the office, and I got acquainted with him there.
Q. Who of the firm received the meat at the packing-house?
A. Well, Leander stayed there most of the time.
Q. The one that you call Dick, is it?
A. Yes, sir.
Q. Did you know of the plaintiff prior to the arrival of his meat?
A. I didn't know him; I never saw him; I don't know I ever heard of him until he arrived here. I don't recollect that I did.

Q. You say he came down to the office; did you see him at
264 the office?

A. Yes, sir.

Q. What took place at the office between you and he in respect to this meat, if anything?
A. He inquired if his stuff was in, and we talked about what he had done, what amount of hogs he had got out in Des Moines, and the stuff coming forward here very soon.
Q. Do you remember whether or not at that time his stuff had come forward?
A. No, sir; I don't think it had. I cannot recollect; that is my impression.
Q. Did he give you any directions? and if so, what were they in respect to the stuff?
A. Well, he asked the prices, and I told him as well as I could recollect, and my impression is now that he asked me what I thought about selling; and I didn't encourage an immediate sale, from the fact that I thought that prices would be better in a short time. He said he was going to be here for some time, and the thing stood that way; and he finally—lard commenced going up—and he put a limit on that--on his lard—that if I could get a certain price for it, (I don't recollect just what it was now—what his limit was,) but I got over his limit, and sold it. I think it is the only stuff that he ever gave me a limit on.
Q. Do you remember what that limit was?
A. Well, I don't. I could not sware positively what that limit was.

Q. Can you tell about what time that was?
265 A. Well, it occurs to me in February, though I am not positive about that.

Q. How long was the plaintiff here in Chicago and about your office?

A. Well, I don't know, he was here, I should think, six weeks or two months, may be a little more.

Q. You saw him frequently?

A. I had a good deal of business on hand. Yes, sir; I saw him frequently, sometimes he would be about the office every day for a week and then he would be off some place for a week, that is my memory.

Q. Whose office was that?

A. Well, it was Miles Murphey & Co's.

Q. Did Murphey and Allen have any office in this city?

A. No, sir.

Q. Did they do any business here in the city?

A. No, sir; not as a firm.

Q. You say that you sold a portion of his lard; state what, if anything, was done with the proceeds?

A. Well, I don't recollect now, I have not been conversant with the books—at the time I knew all about it—at the time, whether his lard amounted to more than $4,000 or a little under, I am not able to state, but at all events he wanted $4,000, or said that $4,000 would do, and we gave him a check. It was paid, anyhow, through Miles Murphy & Co., $4,000; and he told me that when the balance of it was sold to place it to his credit at the Fifth National Bank, and notify him of the same.

266 Q. Was he on 'change with you at any time while he was here?

A. Yes, sir; very frequently.

Q. Was he advised of the condition of the market?

A. Yes, sir.

Q. Was or not the conversion of pork products such as this was, easy at the market rate?

A. Well, round lots; I have always been able to get for round lots of Des Moines pork about the market price, about as high as anybody was able to get for such stuff. But you could not sell an uneven lot, say 15,000, or 27,000, or 47,000, or anything like that; you could not sell for full prices, from the fact that there would not be a cargo; it would not make up a round lot for anybody that wanted one, or two, or five cargoes, as a general thing, that is the way we sell stuff.

Q. Explain what you mean by round lots?

A. 20,000, or 40,000, or 100,000.

Q. Why do you call them round lots?

A. Because there is one, or three, or five car loads, that is the reason simply, 20,000 pounds is a car load.

Q. Could you or not have sold such lots of meat as Mr. Killinger was—I will ask a question before that—Was Mr. Killinger's meat kept by itself, separate, in the packing-house?

A. Yes.

Q. Was that done with all the other parties?

A. Yes, sir; all kept separate.

267 Q. Now I will ask you the question. Could you or not have sold the pork of Mr. Killinger, as it was, by droping a little below the market prices?

A. Yes, sir; could always have sold by dropping it below the market.

Q. Did you ever have any authority from Mr. Killinger to sell it below the market?

A. No, sir. The way that I happened to get a shade above the market on the other is, I put a lot of ours with the lot, and that made an even lot, and so I was able to spring to the market.

Q. Did you receive any other instructions from Mr. Killinger respecting the disposition of the proceeds of his pork than that you have mentioned?

A. No, sir.

Q. Prior to his going away?

A. No, sir; I never did.

Q. What was the arrangement with Mr. Allen as to the disposition of the pork generally packed at Des Moines, how was it to be disposed of, what was to be done with the proceeds of the Des Moines pork?

A. That he had advanced on?

Q. Yes; and on your own.

A. That is all the same. After the sales the proceeds was to be deposited at his credited at the National Bank.

Q. Was there any exception to the general arrangement between the firm and Mr. Allen?

A. No, sir.

268 Q Were the proceeds of the sale of the Des Moines pork, except Killinger's so disposed of during the winter and up to, say about April?

A. Were they disposed of?

Q. Where they deposited in any way? I mean up to say about April?

A. Which?

Q. Let me ask you the question again: Were the proceeds of the sale of the Des Moines pork in the house of Miles Murphey & Co., and for sale deposited at the Union National Bank up to say about the first of April?

A. Yes, sir.

Q. Do you remember about what time Mr. Killinger left here?

A. No; I don't recollect about that. I think, however, it was in March.

Q. Did he say anything about coming back when he left?

A. He did, but I don't recollect when, I don't recollect now.

Q. Did he give you any further instructions as to his pork in going away?

A. No, sir.

Q. Had there been any sales of his pork made apart from the sale you have spoken of, at the time he left?

A. No, that is my impression. Up to that time it was all that was made, but very soon after he left, I think, we sold some stuff of his and the amount went to his credit on the books.

Q. What was the arrangement as to the payment of freights upon the Des Moines stuff?

A. Well, my contract with Miles Murphey & Co. was, that they were never to be out more than $10,000 at one time, that we should keep the freights down to $10,000 or below that, and that
269 they should never be out more than $10,000 at one time.

Q. Who was to pay the freights on the arrival of the stuff here?

A. Miles Murphey & Co.

Q. How were they were to be reimbursed?

A. From the sales of the stuff.

Q. The arrangement was—

A. That the concern never should be in debt more than $10,000 at one time.

Q. Was there any other advances on account of any of this pork by Miles Murphey & Co., any other advances than freights?

A. No, sir.

Q. Did you have anything to do with the final settlement of the books of the concern of Miles Murphey & Co.?

A. No, sir.

Q. You went away in April, the first of April?

A. Yes, sir; about the 10th of April.

Q. How long were you away?

A. I don't recollect, but I think I was away then about 4 or 5 weeks; 4 weeks I think, something like that.

Q. What was the condition of things when you returned?

A. Well, sir, they were not very pleasant, not in very good shape.

Q. What was the condition of Miles Murphey & Co.'s firm?

A. Well, they had no assets.

Q. They owed some debts.

A. Yes, sir; they owed a good many.

By a juror:

I understand you to say that after Mr. Killinger left, his stuff was disposed of?

270 A. There was some stuff sold after he left for Pennsylvania. I think he left in March, and very soon after he left there was some of his stuff sold and the proceeds was placed to his credit on Miles Murphey & Co.'s books.

Q. I will ask you whether Murphey & Allen had any interest in the rebate or reduction of the commissions under this arrangement with the house of Miles Murphey & Co.?

A. Murphey had not, I know that.

Q. Had the firm of Murphey & Allen?

A. No, sir; it was to go to the credit of B. F. Allen.

Q. It was Mr. Allen's exclusively?

A. Yes, sir.

Cross-examination.

By Mr. Roberts:

Q. Mr. Murphey, will you look at that paper and state if you remember of seeing that before, and when, if so; [handing witness a paper]?

A. Well, I don't know whether I ever saw this before or not; by looking at it here, I could not tell whether it was correct or not.

Q. You recognize the handwriting of that?

A. No, sir. I could not recognize the handwriting.

Q. Do you remember whether in fact, Allen or the clerk of Murphey & Allen at Des Moines sent down a statement of the number of hogs packed from the various parties?

A. Yes, sir.

Q. When was that sent?

271 A. It was sent in the—well—as soon as they were done packing, I think; that is a thing I didn't pay any attention to, from the fact that when I got anything of that kind, it was handed over immediately to the book-keeper and L. C. Murphey, who had charge of it at the house. I didn't take charge of any business of that kind.

Q. Who was the clerk of Murphey & Co. at the Des Moines packing-house?

A. What was his name?

Q. Yes.

A. McVicker.

Q. You don't remember his handwriting?

A. No sir; I never knew him; only seen him perhaps.

Q. You remember that an abstract was sent of the amount of the pork, and the various names of the parties?

A. Yes, sir.

Q. Do you remember when it was sent?

A. I don't: that is usual in all transactions. I am not conversant enough with Mr. McVicker's handwiting.

Q. You usually handed those things over to the book-keeper?

A. Yes, sir.

Q. Didn't make any particular memoranda of them, I suppose, at the time, with whom was the correspondence with there, at Des Moines?

A. What?

Q. With whom was the correspondence at Des Moines? Allen personally?

A. Yes, sir; he did all the correspondence, I think, out there.

272 Q. He corresponded with Miles Murphey & Co., or with you?

A. With me generally. May have written them some letters.

Q. Do you remember of his writing a letter to Miles Murphey & Co. previous to the time you refer to with reference to that business?

A. Well, it has been so long ago that I could not; he might have done it and might not; I couldn't say.

Q. You cannot now recollect; your recollection is that the correspondence was with you individually?

A. Mostly.

Q. Those abstracts were sent to you?

A. Yes, sir; I presume so. They may have come to Murphey & Co., but, at any rate, I turned them over to the house after they came to me.

Q. You were the salesman of the house?

A. Yes, sir.

Q. And when you made a sale did you enter it?

A. So far as provisions were concerned?

Q. As far as meat and pork were concerned.

A. Yes, sir; I never done anything in grain.

Q. I mean with reference particularly to provisions, or pork, as we call it?

A. I attended to that.

Q. When you made a sale, what entry did you make of it, or cause to be entered of it?

A. I reported it to the book-keeper.

Q. Did he enter it?

A. Yes, sir.

273 Q. In the books of Miles Murphey & Co.?

A. Yes, sir.

Q. Murphey and Allen kept no books here?

A. No, sir.

Q. The accounts of Murphey and Allen all went through the books of Murphey & Co.?

A. Yes, sir.

Q. And the entries were made by your direction?

A. Yes, sir.

Q. Where is your book-keeper now?

A. I think in New York, in N. Y. State, but he may be in England for all I know.

Q. You would go on 'change, and make sales there?

A. Yes, sir.

Q. And then come back to the office, and make up the entries?

A. Yes, sir.

Q. You entered up those credits to the various parties at the time of the sales?

A. I would say that I had sold John Brown 100,000 of sides, that is the way that I reported, that I had sold a certain man a certain amount of stuff at a certain price.

Q. If it was Allen and Murphey stuff, it was credited to Allen & Murphey?

A. At that time nothing was said about that; I could'nt say anything about that; that was never talked of then. When that stuff was delivered, then the account came from the packing-house whose stuff it was.

Q. Then it was entered?

274 A. Then it was entered.

Q. You would sell for future delivery?

A. Yes, sir; not very frequently, but occasionally; not frequently at all.

Q. You sold for immediate delivery?

A. Generally cash, and immediate delivery?

A. And you calculated to deliver immediately?

A. Yes, sir.

Q. You took the entries from the pork-house, and entered them in the book?

A. Yes, sir.

Q. And you kept the books at the pork-house?

A. Well, yes; they were kind of a—

Mr. Robert to the marshal of the court:

Have you sent for those books of Murphey & Allen?

(Marshal.) No, sir.

Q. All these accounts passed through the books of Miles Murphey & Co.?

A. Yes, sir.

Q. You kept those accounts in the books for the account of B. F. Allen, and in his name?

A. Yes, sir.

Q. And in the name of Murphey & Allen, didn't you?

A. Well, I don't recollect how the accounts were kept or anything now; I have not looked over the books since. In fact, I could have looked at them if I desired, but I never have looked at them.

Q. Leander Murphey stayed down at the pork-house, and
275 managed there?

A. Yes, sir.

Q. Miles Murphey was generally absent?

A. Yes, sir; he was there sometimes.

Q. Robert Murphey was absent a good deal in the winter, at Boston?

A. Well, at the stock yards; he returned before winter; he was not gone in the winter time.

Q. You stayed at the office and managed there, and on 'change?

A. Yes, sir.

Q. All the books were kept under your direction, were they not?

A. No; I never directed the entries, because I didn't know how; I am no book-keeper. I don't think I ever directed an entry in the books, from the fact that I am no book-keeper.

Q. Who did direct the entries?

A. R. P. and L. E. Murphey; they are both book-keepers, and were both at the office. R. P., I reckon, didn't miss a day to look over what the book-keeper was doing. I never gave any directions about making the entries on the books.

Q. You furnished the information on which the entries were made?

A. Yes, sir.

Q. And the entry on the book is intended to represent the fact as to whose pork was sold?

A. I said I didn't oversee, but I am very confident that that was carried out.

Q. If any pork of Murphey & Allen was sold it was credited to to them, and cash charged?

A. I suppose so.

276 Q. The books were correctly kept; were they not?

A. As far as I know.

Q. Have you ever had any reason to suppose that false entries were made in the books?

A. No, sir.

Q. The entries, so far as you were advised, correctly represented the transactions at the time they occurred?

A. I know nothing to the contrary.

Q. And you never have heard anything to the contrary? have you, from anybody?

A. No, sir.

Q. And this man Rouse was book-keeper, was he?

A. Yes, sir.

Q. And he was a competent man?

A. Yes; he was a good book-keeper.

Q. I understand you to say that none of Killinger's pork was sold previous to the time when you went away?

A. Not to my knowledge; not so far as I recollect.

Q. Have you searched your memory with reference to that matter at all?

A. I have not looked at any books; have no other means of making any search.

Q. Now, didn't you in fact make a sale the 28th Feb. to Pryor & Sanford, of 968 shoulders, for $1,991 86.

A. I could not tell without going back and looking over the books; it would be entirely at random.

Q. If the books would show that fact they would state truly about it?

277 A. Yes, sir; I should say it was right if it was on the books.

Q. Why did'nt you pay over that money to Killinger while here?

A. I paid him $4,000.

Q. That was on the lard?

A. Likely it was, or was not; it might have been not more than $3,000 or $4,500; at any rate we gave him $4,000 on account.

Q. That was when we sold the lard?

A. After we sold the lard.

Q. You sold the lard did you, the 10th February, to Flint and Thompson?

A. Yes, sir; Flint and Thompson, I believe, I won't be positive about it.

Q. Do you remember that you told him at the time you sold the lard that you had'nt sold any of the pork?

A. No, I don't recollect that thing, it has been too long ago to recollect anything of that, it has been so many years since.

Q. Can't you remember at all about that?

A. No, sir.

Q. Your recollection of these items is distinct, or indistinct?

A. Indistinct; it is distinct that I paid him $4,000 on account.

Q. You rember that, but you cannot remember whether it was on lard or pork?

A. I can't recollect whether we owed him more than four thousand dollars or less after deducting the freight, perhaps we had sold some shoulders and had sold some lard, and it might amount to 400 or $5,000, and then the freight taken out $4,000 would have been probably as much as there would be coming to him; that is simply a supposition, I don't make that as positive.

Q. Killinger was over there in the office every few days
278 while he was here?

A. Yes, sir.

Q. Did he, or not, urge the sale of his pork during all that time?

A. Well, at the market prices, he was not urging it, but we thought we could do better, and he did'nt say "sell;" If he had said "sell" at less than the market price, we could always have sold it, but he never did tell me.

Q. Did'nt you tell him, when you went away, that you had never sold any of his pork?

A. I don't recollect about it.

Q. You don't recollect that you did?

A. No, sir; I don't recollect now, what I told him when I went away?

Q. You said, in your examination by Mr. Jewett, that you thought that you had'nt sold any of his pork?

A. Yes, sir; that was my impression.

Q. And is now?

A. Yes, sir.

Q. He did'nt go until March or April sometime?

A. I don't recollect.

Q. You recollect that sale of 968 shoulders to Pryor and Sanford?

A. I cannot recollect.

Q. You cannot recollect that transaction?

A. No, sir.

Q. I mean during the month of Feb.—this sale to Prior and Sanford; you don't remember that transaction?

A. No, sir.

Q. You cannot therefore remember what you did with that
279 money?

A. It has been credited up to him I suppose, and the freight. I say what I said before. I don't say that that is the way of it, but that is my supposition, that that was kept back to pay his freight; I don't pretend to say that that was the fact though?

Q. You did'nt expect that his freight would amount to $1,991, did you?

A. No, sir; that is a thing I did'nt pay any attention to.

Q. Why do you think that that was kept back to pay his freight then?

A. He wanted so many thousand dollars. I suppose that if he wanted $5,000 we would have given it to him, and so we would and if he wanted $6,000, I suppose, and have run the risk of getting it afterwards.

Q. He told you to deposit this money to his credit in the 5th National bank?

A. Yes, sir, when his stuff was sold.

Q. You remember his telling you that he was now doing business for himself, and that if it was satisfactory to you he would like so to deposit it?

A. Well, he took this $4,000 himself and when the balance of his stuff was sold, he wanted the money placed to his credit at the 5th National bank and to be notified.

Q. To be notified of it?

A. To be notified of it. Yes, sir.

Q. Did he give you his address?

A. Yes, sir.

280 Q. You notified him by letter?

A. Yes, sir.

Q. Did you deposit that 1,991 odd dollars to his credit?

A. No, I did'nt, I don't know whether it was done or not.

Q. Why?

A. We may have been short, I would'nt be surprised, I don't know we did'nt do it; we got that way occasionly.

Q. Do you remember the sale to Plillips & Co. of 439 of his hams?

A. No, sir.

Q. On the 11th March?

A. No, sir.

Q. You have no recollection of making any sales to Phillips & Co. at all?

A. Yes, sir; I remember of selling G. W. Phillips some stuff, but whose stuff I could'nt say from memory.

Q. Do you remember whether you notified Killinger of that sale?

A. No, I don't recollect.

Q. Do you ever remember of notifying him of any sale after he went away, and that you placed the money to his credit at the 5th National bank?

A. No, we placed his money to his credit on our own books.

Q. And you never placed any to his credit in the 5th National?

A. No, sir.

Q. Nor in any other bank?

A. No, sir, not to my knowledge.

Q. Did you make these sales of sour shoulders to Ewing?

A. I don't recollect the name now; Ewing perhaps was some outsider, I don't recollect that name.

Q. Do you remember the name J. W. Finley?

281 A. Yes, sir, I knew Finley, he is here now.

Q. 231 sides; do you remember of making that sale to him?

A. No, sir; I made sales of round lots, and those round lots would be made out of other lots.

Q. Amounting to $1,255 80?

A. I could'nt recollect.

Q. Do you remember of making a sale of some of Murphey and Allen's stuff as well as of Killinger's 5,601 82, and depositing that to his credit.

A. What stuff was that?

Q. It was sides; as far as Killinger's lot is concerned, 231 sides on the 14th April; you say that you did'nt go down there and examine the books?

A. I went into the office the other day to examine the books, but did'nt do it, and then I have been sick for three or four days and have not looked over the books so as to prompt my memory, or see how these transactions stand.

Q. If in fact, your books show that on the 4th of April, you had charged Allen with cash $5,601 82, you deposited that to his credit, did you?

A. I would'nt be positive about that.

Q. What would become of the money that you charged to Allen?

A. I should have deposited it at Coolbaugh's.

Q. To whose credit?

A. B. F. Allen's, but I don't know that I did do that; I might have kept that for my own private purposes, I don't recollect.

Q. Were you in the habit of keeping money which you charged Allen in that way?

282 A. No.

Q. You don't remember of any instance in which you did do it?

A. Yes, sir; I did, just before I went away I kept some.

Q. How much?

A. In all about $23,000.

Q. Do you think that included this sale of April 4th?

A. I don't recollect what it was made up from, I don't recollect now what it was made up from.

Q. Did you keep any memoranda of your deposits for Allen in Coolbaugh's bank?

A. No, sir, the book-keeper kept it, I didn't keep any books myself.

Q. He entered up the charges against Allen as you made your deposits?

A. Yes, sir; I would bring a bill of credit from the cashier, and he would enter up the charges from that bill of credit against Allen?

Q. If on the 4th of April, there was a charge against Allen of $5,601 82, you furnished it to the book-keeper as a deposit?

A. I say that I cannot say now at this late day how that was.

Q. Why would'nt you charge it up to Murphey & Allen if you got it?

A. I did'nt make any charges.

Q. Why did'nt you have the book-keeper charge it up to them instead of Allen?

A. I don't recollect now about the particulars of any transaction so long ago as that.

Q. Do you remember a sale to Hanback of some shoulders?
283 A. What kind?
Q. On the 6th of April.
A. Sour or sweet?
Q. Sweet?
A. I think I recollect of selling him some sour shoulders; I have a faint recollection of it.
Q. It is put down here at 12½ on the sixth April.
A. That was about the sour price.
Q. Killinger had a good deal of sour meat?
A. I think not, I don't recollect as he did.
Q. The meat came here to order, did it?
A. It was'nt cured when it came here fully.
Q. A good deal of it turned out, on the account, to be sour, how did that happen?
A. That was frequently the case, we got meat here very frequently, certain lots on certain days, that run bad.
Q. Do you remember of selling to Gregson on the 14th and 18th sour hams and sour sides?
A. Of what?
Q. The 14th of April?
A. I was not here then.
Q. What time did you leave?
A. Well, I think it was on the 10th of April.
Q. Up to that time the sales had been made by you?
A. I don't think they had all, I was sick, got leave a couple of weeks.
Q. That was in January or the early part of February?
A. In February, perhaps, I think that during that time the
284 boys made some sales, but I don't recollect now.
Q. Look at that letter from Allen, speaking about your sickness and say if you received that letter, it is dated the 3d?
A. It is dated the 5th.
Q. Look at the close of that letter and see if that speaks of your sickness?
A. Well, I was down I think about 2 weeks.
Q. When did you get around? had you got around when that letter came?
A. I could'nt recollect about that.
Q. Was it January or February?
A. I was down longer than I expected.
Q. That is dated the 5th of February; it must have been about in January that you received that injury?
A. I presume by that that I was not around; yes, that letter was written by Allen to me.
Q. In the middle of February, at least, you had got around, had'nt you?
A. I presume so.
Q. Then the sales up to the middle of February, and up through March and April, were made by you personally, were they?
A. Yes, sir, I think so.

Q. This sale on the 28th Feb. to Pryor and Sanford, must have been made by you personally?

A. Yes, sir.

Q. All through March and up to the time you left in April you made these sales personally?

A. Yes, sir.

285 Q. According to your recollection, why did you keep a separate account on your books with Allen and one with Allen and Murphy?

A. I don't know why that is; it is no direction of mine, that I recollect of now.

Q. Is that a mere whim of the book-keeper?

A. It cannot be explained by me, from the fact that I don't know.

Q. You don't know whether it was a mere whim on the part of the book-keeper or whether these entries really represent actual transactions?

A. As I say it cannot be explained by me, because I don't know.

Q. State whether or not when Killinger left you did not tell him that you had not then sold any of his pork?

A. Well, I would not be liable to recollect it.

Q. You never did deposit any money to his credit in the 5th National Bank?

A. No, not to my recollection.

Q. You now state that Killinger did not tell you when he let finally in March to deposit his money to the credit of Allen?

A. Yes, sir; he never told me after the first time, never changed his order.

Q. Did he never tell you to deposit this money to Allen's credit, any of it?

A. When he first came here I think he said that was the understanding.

Q. With Allen?

A. With the understanding that Killinger was to deposit it

286 with Allen, but after he came here he talked about it a while, and he said he was going home and he wanted to take some money with him, and that I might sell it; in the mean time Allen came, and I told Allen about it, and Allen said it was all right to let him take charge of his own stuff, and sell it when he pleased, and collect his money; that he only owed for the packing, or part of it, 5 or $600, and that he was good for that; that he was out there frequently and made some casual remarks about it that way; that it was all right.

Q. When was it that Allen had that talk with you?

A. That was, I think, in January; I think in January, but am not positive.

Q. What time in January?

A. I don't recollect.

Q. Before Killinger came or after?

A. After.

Q. Killinger had at that time told you to deposit it to Allen's credit?

A. No, sir; he had then made application to take charge of the stuff himself.

Q. What charge did he apply for, you say he made application to take charge.

A. Talking about the prices, [about the prices,] and we advised him about the market.

Q. Did'nt Barnes do the same think?

A. Yes, sir.

Q. And Sipher did the same thing?

A. Yes, sir, Mr. Allen advanced the money on theirs, and the money was to go to his credit because they owed him.

287 Q. He advanced those packing charges of Killinger's?

A. Yes, sir, he had advanced them, and said that Killinger owed him 5 or $600, and he said that was all right, that he was good for that.

Q. And that he would go to Killinger for that?

A. And that he would go to Killinger for that.

Q. He did'nt agree for you to deduct that at all?

A. No, sir.

Q. You never got any account from Allen of that?

A. Never in a legal form.

Q. What do you mean by a "legal form?"

A. The bill made out and handed in.

Q. You never got it in a formal way?

A. No, sir.

Q. When did you first get that account from Allen of packing charges?

A. I never got that account.

Q. Was'nt it sent to you?

A. It never was sent to me to my recollection.

Q. Was it ever sent to Miles Murphey & Co., previous to the time that you left Mr. Murphey?

A. Well, I wont be positive now; I don't remember whether it was or not, it sort of seems to me like a dream that it was here, but about it, I have not thought of it since until now, and I could'nt say positive now on that point.

Q. Did you make a sale about the time when you were leaving of a considerable quantity of Killinger's sides to Pryor and Sanford?

A. Not that I recollect of.

288 Q. You don't remember that?

A. No, sir.

Q. Do you remember of making a sale to Pryor and Sanford about the time that you left, and a large quantity?

A. I recollect of selling them some stuff in the house.

Q. Did that include all the stuff there was in the house?

A. No, sir, I think not.

Q. What was there excepted in that?

A. I don't recollect now, but there was considerable stuff there?

Q. How much did the sale amount to that you made to Pryor and Sanford about that time?

A. Well, I could'nt state positive about that.
Q. About how much?
A. I could'nt be positive,
Q. Could'nt you approximate it?
A. It would not be for me to approximate when I could'nt say what it was.
Q. They have never paid nothing?
A. They have paid nothing to me.
Q. Why not?
A. It was never received.
Q. It was not delivered to them?
A. It was not delivered to them.
Q. Why did'nt you deliver it?
A. I had'nt time.
Q. Why did'nt you deliver it?
A. I had'nt had time.

Q. Who was acting here for Pryor and Sanford?
289 A. Sanford.
Q. Pryor was not here?

A. He was here too.
Q. They were both here?
A. I think so, but they might not have been here, they both lived here.
Q. Do you remember of sending 700 Killinger's hams up to Duffields smoke-house?
A. No, sir.
Q. Who sent them up?
A. I don't know, I did'nt send them there to my recollection, by my orders at least.
Q. If they got there, how did it happen?
A. I suppose they were sent there by whoever had charge of the house.
Q. Whoever had charge of your packing-house.
A. Yes, sir.
Q. And that was Leander?
A. Yes, sir.
Q. Who ordered him to send them up there?
A. I don't recollect anything about that now, I would not be likely to recollect about that.
Q. Why not?
A. Unless my mind had been refreshed by looking over the accounts and books I would not be likely to recollect.
Q. What were they being smoked up there for—these hams?
A. To fill a contract for the government.

Q. What contract?
290 A. And some of them I think were Cook and Barnes, that they took west afterwards; I think so, I would'nt be positive.

Q. West, shipped here?
A. I think they shipped them west to the mountains, somewhere; that is my impression, but I ain't positive.

Q. Don't you remember an arrangement with Culbertson & Blair, to help fill a contract which they had with the government?

A. Yes, sir.

Q. Did you, in pursuance of that arrangement, put homs in Duffield house to be smoked?

Ans. Yes, sir.

Q. How many were put in?

A. I don't recollect.

Q. As much as 12 or $15,000 worth?

A. I say I can't recollect.

Q. Whatever hams went in to that house, went in by your direction?

A. I don't know about that.

Q. I thought you just stated that?

A. I said hams went there, I can't say—

Q. They went there in pursuance of—

A. I say that it was about that time that we failed that they went there, and they may have more gone there than the contract, and there may have less gone there.

Q. What time did you fail?

A. I think about the 10th or 12th of April, the 10th perhaps.

Q. Were not those hams there at the Duffields' house a week before that?

291 A. That is, nearly close to to the failure, when anybody knows they are going to fail—

Q. I will refresh your memory by a circumstance. Do you remember of having the warehouse and smoke-house receipt for these hams?

A. Yes, sir.

Q. Where did you get it?

A. At Duffield's.

Q. Where is that receipt?

A. I think I gave it to Mr. Allen.

Q. Why do you think you did?

A. I have'nt got it myself.

Q. Is your recollection indistinct as to what became of that?

A. That is my impression, that I gave to Allen.

Q. When?

A. At the same time I received it, or shortly afterwards. He was here I think on Saturday, and I left on the following Monday.

Q. Why did you give him that receipt?

A. Because he had money in the stuff of Cook & Barnes, and various ones as I understood it then.

Q. He had money in the 700 hams of Killinger's?

A. I don' know that they were in there, I think that the stock was made up from Murphey & Allen, and Hoyt & Sherman, and Cook & Barnes, and Sherman & Hays; but I don't know that these lots were put in.

Q. Why do you think it was made up of the stuff of these persons?

292 A. Because we had that stuff on hand and were authorized to put it in.

Q. Would Leander Murphy have gone and put the 700 in there without your knowledge?

A. He would have done right to; he had a right to.

Q. Would he have done it.

A. I cannot tell what anybody would do.

Q. Would he have taken the receipts?

A. He had a perfect right to have taken the receipts.

Q. You have now said, Mr. Murphy, that you have no recollection at all of giving any directions about putting Killinger's hams in there, and know that they were in there?

A. I would'nt sware positive that Cook & Barnes had a ham in there, but that is my impression; I would'nt sware that Killinger had a ham in there; I know that we put in hams, but whose lots made up that identical lot I would not sware to.

Q. Could they have been put in through a mistake, these of Killinger's?

A. I cannot tell what might have been done you know?

Q. Your intention was to put in the hams of these other people up there because you had control of them?

A. Well, I cannot recollect now what my intentions were then; no doubt my intentions then were right, but what they were I cannot.

Q. Can you get at the date of that, when these hams were put there, about?

A. I have no means of knowing the date.

293 Q. Is there any means now of ascertaining it here in the city?

A. I suppose that L. E. Murphey can tell about that.

Q. How?

A. I suppose that he could get the account.

Q. How could he get it, and where?

A. From the books.

Q. The books of Miles Murphey & Co.?

A. Yes, sir.

Q. What books of their's will show?

A. I don't know that any book will show it; he can tell you more than anybody; I cannot, I don't recollect.

Q. I want to get at that fact, if it is possible to get at it; you have not arrived at the date of the delivery of these hams at the smoke-house. Now, on whose account were they put into that smoke-house?

A. Well, sir, I don't know, but I presume on account of Miles Murphy & Co., I presume so; I don't know why they should not be there, because we took the receipts in that name, or Murphy & Co.; it is one or the other.

Q. Did you not cause it to be entered in the books as a transaction of Murphy & Allen?

A. No, sir; not to my recolection.

Q. You did'nt?

A. No, sir; not to my recollection.

Q. If it was so entered, was it truly entered?

A. I don't recollect anything about it, and so I could'nt say whether it was truly entered or not.

294 Q. Why should Miles Murphey & Co. be undertaking to—
A. I was acting for Miles Murphey & Co. here.
Q. And you were acting for Murphey & Allen, were you not?
A. I was acting for Miles Murphey & Co., and Murphey & Allen.
Q. When Murphey & Allen were charged or credited on the books of Miles Murphey & Co., was that by reason of some actual transaction, or was that a mere whim?
A. Well, I never examined the books; I supposed they were all right, I never ordered an entry.
Q. What I desire to get at is this point: If the books actually show that Murphey & Allen had these 700 hams, then you put that in Murphey & Allen's account?
A. It is hard for me to recollect a thing that I cannot recollect.
Q. I am not speaking of the character of the recollection, but of my getting at the authenticity of the books?
A. I presume that the books were kept right; I never suspected they were in any other way only right, that they were all straight sir.
Q. You made this arrangement with Mr. Lyman Blair personally?
A. No, sir.
Q. Who with?
A. Lyman Blair made a government contract, and in that contract I was to put in. Miles Murphey & Co. was to put in so much stuff, but what the amount of the stuff was I don't recollect.
Q. Miles Murphey & Co. had any stuff of their own to put in?
A. They controlled stuff, that was the same thing.
295 Q. They had control of this stuff that Killinger had, of Des Moines?
A. Yes, sir.
Q. You were not then putting in in behalf of Killinger?
A. No, sir; in behalf of Miles Murphey & Co.
Q. Did you ever deposit any of Killinger's money to the credit of Allen in Coolbaugh's Bank?
A. No, sir.
Q. You never did?
A. No, sir; not that I recollect of.
Q. The proceeds of Killinger's pork I mean?
A. No, sir.
Q. You never did?
A. No, sir.
Q. You feel confident of that?
A. That is my impression.
Q. Why?
A. Because I never was instructed after any of it came into the office of Miles Murphey & Co.; I was not instructed to do that way.
Q. Is it because you remember that you had no instructions that way?
A. I ain't very liable to go contrary to instructions.
Q. But you never told any of the members of your firm that Killinger's cargoes were to be excepted from this contract for two and

a half per cent of the commissions, and one per cent of which Miles Murphey & Co. were to get.

A. I don't recollect about that now very well; I know there
296 was something said about Killinger, and they said that Killinger's hogs were different from the others, from the fact that Allen had made no advance on them, and we were then to be entitled to full commissions on them.

Q. Who said that?

A. I think that was the understanding with the firm, and I think the firm got the benefit of two and a half per cent.; but I am not positive about that, but that is my impression.

Q. When did you get that impression?

A. Well, when they made the contract; I think from Robert or Dick; one or the other of them told me that Miles Murphey & Co. had had the benefit of the full commission; I don't say this positively but that is my impression.

Q. That is since you came back?

A. That is since I came back.

Q. I am asking you whether, previous to the time when you left, a word was ever said to Miles Murphey & Co., or Allen, both or either of them, to any member of the firm of Miles Murphey & Co. about excepting Killlinger's hogs from this regular commission of one per cent?

A. I don't recollect.

Q. You recollect going with Killinger down to the office of Mr. Jewett?

A. Yes, sir.

Q. What did you take him there for; did you invite him to go there?

A Well, I went there with him; I thought likely he was going to see me or do something; and I wanted to get ready for the defence; I had nothing to pay with.

297 Q. That was about your idea in taking him there?

A. Yes, sir; one idea.

Q. Wasn't he pressing you for money then?

A. Yes, sir.

Q. Did'nt you tell him that if he would go around there you would see whether Mr. Jewett, who was Mr. Allen's lawyer, would not arrange for the $1,000 of the $3,000, which he was demanding from you?

A. A thousand, no; that was the time he talked about he must have $3.000.

Q. You told him that you thought you might raise about $2,000?

A. I don't know whether I told him what I could raise. He wanted $3,000; I recollect he said he must have $3,000.

Q. Did'nt you advise him to come down to Mr. Jewett's?

A. I never offered him no $3,000, nor one thousand; I think if I had he would have taken it.

Q. I have no doubt about that; but the question is, did'nt you invite him to go there with reference to seeing about a thousand dollars of it being raised on behalf of Allen?

A. No, sir.

Q. What was said about that?

A. I don't recollect what was said about raising money there.

Q. Let me see if I can refresh your memory: You say that that understanding was, or your recollection of it is, that he wanted about $3,000?

A. Yes, sir.

Q. Did'nt you tell him that perhaps you would be able to raise him a couple of thousand, and that if he would go down to see Mr.
298 Jewett, who was Mr. Allen's counsel, you might arrange with him for the other thousand?

A. That I might arrange with Mr. Jewett for one thousand; where was the other two to come from?

Q. I ask you?

A. I don't recollect anything about that; he talked about wanting $3,000; but about getting a thousand of Allen or anybody, I don't recollect; that is all new to me.

Q. Did'nt you go to see Mr. Jewett with him in reference to a thousand coming from Allen?

A. Not that I recollect of.

Q. What did you go there for?

A. Well, I went there with him as I told you; I supposed that he was going to pitch into me in some shape, and I was not a lawyer, and never had much to do with law; never had anything to do with law up to the present time; I didn't know what would be my next trouble.

Q. Don't you recollect saying there, or asking Killinger whether he had'nt directed this money, this hog product, when paid to be deposited to his own credit in the Fifth National Bank, and that that let Allen out?

A. Well, there was some talk, but I could'nt recollect; I could not rehearse anything to review what was said, but there was some conversation there about depositing in the Fifth National Bank, and so on and so forth, but what it was I could'nt say; because I was a good deal confused at the time and troubled.

Q. He had admitted that he had given such an order, did'nt he?

A. I believe he always admitted.

299 Q. On that occasion?

A. I say on that occasion, I don't remember.

Q. You don't remember the conversation that occurred about it?

A, I recollect that once we did'nt find Mr. Jewett there.

Q. Do you remember of Mr. Killinger saying right there, "If that is what you trotted me around for, I have never denied that?" Don't you remember of Mr. Jewett saying that that would let Allen out?

Q. No, sir; I don't recollect that; I don't recollect anything about it.

Q. You don't remember of his saying there that he thought that would let Allen out?

A. Well, he would be sure to talk that way; a lawyer would be sure to talk that way.

Q. You did'nt get any money there at that time?

A. If we did I did'nt see it.

Q. Did'nt you tell Robt. Murphy when you came back that you had taken Killinger back to get that mission out of him?

A. I have said a heap of things, but I can't remember what they were; I can't remember things now as well as things that I said 25 or 30 years ago.

Q. You can recollect whether you said so?

A. I say that I can't recollect what transpired two or three years ago, as well as what transpired 25 years ago.

Q. You made these arrangements for the commission; that the firm of Miles Murphy & Co. was to have one per cent., and Murphy and Allen one and a half per cent?

A. Of Killinger?

300 Q. No; of the whole stuff. Was there anybody mentioned there?

A. No; I don't think there was.

Q. You made that arrangement?

A. The stuff he advanced on was talked about, for Allen had to furnish money to everybody most out there that packed; but it seemed when stuff came forward that Killinger was an exception to the general rule; he seemed to have enough.

Q. But you have just stated that you did'nt remember of any exception of that kind being made until you came back, and you never heard anything of that kind?

A. I never knew until I came back what Killinger was charged, and I don't know now he was charged 2½.

Q. And you made that arrangement with Miles Murphy & Co?

A. What arrangement?

Q. As to commissions.

A. Allen said—

Q. Did you or Allen make the arrangement with Miles Murphey & Co?

A. Me or Allen?

Q. You or Allen?

A. I submitted it to Miles Murphey & Co., whether they would do the business at one per cent.

Q. You were the individual who did it?

A. Allen submitted it to me that he could get his business done for one per cent. I submitted it then to the firm and they then decided to do it.

Q. What I wanted to know is, don't you recollect he said that he could get it done by others; that George Severance would do

301 it?

A. I don't remember that individual; I think that Kreigh was named.

Q. Did you tell him the reason that you wanted this one per cent? Were they to have one per cent. and Murphey & Allen one and a half per cent?

A. I never said Murphey & Allen.

Q. Allen was to take 1½ per cent. because he was making the advances?

A. He charged that he controlled the stuff.

Q. You say that you told them that you were making this bargain on behalf of Allen for the provisions?

A. I think that he only got 10 per cent.; that was not unusual.

Q. Did you tell these gentlemen, or any of them, at that time that you were making that bargain; that Allen was to make these commissions, or Murphey & Allen—the 1½ per cent?

A. Allen.

Q. Now just state that.

A. Allen, from the fact that I knew I had no right to any of it; from the fact that I had'nt a dollar in it.

Q. Why were Murphey & Allen credited up with these commisions?

A. That is something that I never dictated, I did'nt dictate the books.

Q. Who did?

A. I don't know.

Q. You now state that you told these gentlemen at that time that was to be Allen's commissions and not Murphey's and Allen's?

A. Yes sir.

302 Q. In consideration of the fact that Allen was making these advances to those various parties?

A. Yes, sir, and controlled the stuff.

Q. How was it with reference to the stuff which Murphey and Allen had? Was that excepted from the assignment?

Ans. That would be one per cent.

Q. Who was to have one per cent?

Ans. Miles Murphey & Co.

Q. That was not excepted from the arrangement?

A. No.

Q. Then, with reference to your, stuff it was not by reason of any advance that Allen was making that the 1½ per cent. was to be paid?

A. He advanced it on all that.

Q. You didn't send any money over to him at all?

A. No, sir.

Q. Then it was by reason of the fact that he advanced all the money?

A. I hadn't any money to send, or any that I could spare.

Q. It was by reason of the fact that he had advanced the money to all these different parties, and also to Murphey & Allen on their stuff for packing, that he was to get this 1½ rebate?

A. Yes, sir; he was to get the 1½ per cent., and, as I said, he was to get 1½ per cent., as he had control of the stuff and advanced the money; and there was not anything to be drawn on the stuff to exceed $10,000 at any one time. That was the contract—not to exceed over $10,000 at any one time.

Q. How much did these advances of Miles Murphey & Co. amount to?

303 I presume it was generally watched and kept down to about that; sometimes it was the other way. Sometimes Miles Murphey & Co. would owe the concern 10 or 15 or $20,000, and

sometimes it would be the other way. The account was satisfactory with the firm; at least that is my recollection; and they didn't growl any.

Q. This stuff all came consigned to you, did it?

A. Yes, sir.

Q. How did that happen?

A. That is something that I couldn't explain, whether it was the book-keeper out there; I suppose he had seen me there, and didn't know Allen. I have no explanation to give, only that I never instructed it that way.

Q. You had power to put this stuff in any house you pleased?

A. Well, yes, sir; but it was an express agreement that it was to go in the house of Miles Murphey & Co.

Q. When did you inform Allen of that agreement?

A. Immediately; that is, before we commenced our business.

Q. Before you commenced the business?

A. Yes, sir.

Q. Did you inform him of that personally, or by letter?

A. Well, I don't recollect now; but it was understood and agreed to that that was all right.

Re-direct examination.

By Mr. Jewett:

Q. I want the jury to understand how these sales were made.
304 You say in your cross-examination that you made the sales generally in round lots.

A. Yes, sir.

Q. Were the sales thus made reported? If so, where?

A. Yes, sir; I did make a statement of that to the jury—that I would go on 'change and sell so many thousand or hundred thousand pounds. Well, that is what I call a round lot—a hundred thousand pounds or two hundred. I think we did once sell three hundred and odd thousand to one man. I would sell a lot at so much per pound, and that quantity would be weighed out at our house, and the book-keeper at the house would say so many pieces weighing so much out of "A's" lot, and so many pieces weighing so much out of "B's" lot, and so make up the amount; and so it would go on the books at the office.

Q. But in the sales, who had charge of the building?

A. I would report to the house; I would go right out to the house and make a report, and the inspector would go there, probably, and get to work and inspect it.

Q. I mean who selected the different lots from which these round lots were made up?

A. When I was about I generally attended to that. I simply said "fill this out with" so and so.

Q. Suppose you were not around?

A. It would be all right for the boys, either of them, whichever of them was there, to do it.

Q. Were you or not the general salesman of the house of
305 Miles Murphey & Company?

A. In provisions? Yes, sir.

Q. Were you not the senior partner of that house here?

A. Yes, sir that lived here; Miles Murphey was older than I.

Q. Have you been in business here prior to the formation of the firm of Miles Murphey & Company?

A. No, sir; we came here all together; we have been together all our lives, pretty nearly. I have been with Miles Murphey twenty years in business.

Q. You have spoken about the entries in the books. Have you examined them enough since you returned, Mr. Murphey, to know whether or not entries have not been made since you went away in the books?

A. Yes, sir; a great many entries have been made since I went away that I don't know anything about, and don't say anything about, because I don't know anything about them.

Q. When you refer to the books you refer to them as they were when you went away, as to how the entries were probably made?

A. Yes, sir; up to the time I left, because I knew then about them; I knew about how everything stood; at least I would watch the bank account every day of every bank, and see how much we owed and how much we had to pay; and all those kind of things I had charge of.

Q. And you sent the accounts from the packing-house to the office for entry on the books?

A. Well, it was done through L. E. We had a man out
306 there named Hallihan, and he is there now. At that time we would do the weighing and would keep it on the book there, and the book would be sent down; that is my recollection, generally.

Q. You say that you don't remember the sales to Philips of the hams in March?

A. No, sir.

Q. Do you recollect making any sales to Philips, or Philips & Company?

A. I recollect, I think, selling some stuff to George W. Philips, of Cincinnati; but the particulars of it I could not recollect.

Q. Was that the sale of the round lot, as you term it?

A. I could not tell now whether I made it in a round lot or a broken lot; it is too long ago.

Q. This $5,601 82 has been alluded to. Do you recollect anything about that sale—it is a sale to Finley?

A. I recollect his name; it is very familiar to me; I know him personally. He is here; but what I sold him, or anything of that kind, I could not recollect. I recollect Finley.

Q. You can't remember whether the proceeds of that sale—were they deposited to this man's credit?

A. No; I know, as I said before, that I kept at that time about that amount—fifty-five or six hundred dollars.

Q. Was that all the money that you kept, as you have stated, be-

longing to Allen, charged up to Allen, charged up subsequently on the books as though paid to him?

307 A. Yes, sir; that is my understanding.

Q. Was there anything, to your recollection, unusual about the souring of Killinger's hams? Did his sour any more than anybody else's?

A. No; I guess not.

Q. State how it is with pork that comes from packing-houses. Is it ever fully cured so as to preserve it?

A. If meat gets frozen before the salt strikes it, it is very hard to cure.

Q. In such cases it will sour?

A. Yes, sir, unless very closely watched; and it is almost impossible—some people think it cannot be cured—if it is thoroughly frozen and then goes into salt; and I have my doubts myself about whether it can be done.

Q. There was not anything unusual in the Killinger lot, to your knowledge?

A. No. I have had a case of that kind this year. I had some shoulders that the inspector would not go through at all. They were all soured, and he would not undertake to select out the good ones, from the fact that they had not been well handled.

B. You say, in answer to cross-examination, that you would not be liable to remember whether you stated to Killinger that you had not sold his pork at the time you went away. Do you remember telling him anything about it, as to whether his pork had or had not been sold?

A. I don't remember talking with him about it; I am not liable to recollect it.

308 Q. Was this Des Moines stuff in the house of Miles Murphey and Company, like all their other commission stuff, for sale? Was there any difference in the mangement of this house in respect to this Des Moines stuff from Iowa stuff, Dubuque or Galena stuff, or anywhere else?

A. No; the stuff was all the same way; as to how it was sent, I don't recollect now. It was all handled in the same way.

Q. It was handled and sold in the same way?

A. It was handled and sold in the same way.

Q. Now about the last of your cross-examination; counsel asked you when you informed Allen of the agreement between you and the firm of Miles Murphey and Company about doing this business and dividing this commission. I will ask you whether or not the arrangement was not understood between you, representing the firm of Miles Murphey & Company and Mr. Allen, before the season commenced?

A. Of course that is what I answered, or about the time it commenced.

Q. When you speak of informing Mr. Allen, did you mean anything more or less than that you told him that the house had consented to do the business on those terms?

A. Yes, sir.
Q. That is what you mean?
A. Yes, sir; that the house would do and expect the business.

309 *Cross-examination resumed.*

By J. H. Roberts, esq.:

Q. Had you done that before talking with Allen on the subject?
A. No, sir.
Q. You first talked with Allen before you talked with the house?
A. I talked about doing the business, and what could be done for him. Allen had talked about others having his business, and I was pretty anxious to get his business; it was a pretty good kind of business I thought to get.
Q. Did you have the packing of all this pork up there at Des Moines with Allen? it was Allen and Murphey's house.
A. Yes, sir; it was Allen and Murphey's house, owned jointly, and I was interested in the profits and losses.
Q. You had a right to dictate where it should go as well as Allen?
A. No, sir.
Q. You considered it his business up there?
A. Yes, sir; he had the control of it; he paid for the stuff.
Q. And you were a mere cipher?
A. Yes, sir; if you have a mind to call it that. I had an interest in the house, but had no money in the concern, only the house was paid for.
Q. You have been very desirous to throw this debt of Killinger's on the house of Miles Murphey & Company from Allen's shoulders?
A. It is not a debateable question whether Miles Murphey & Company have received the whole of this amount of Killinger's;
310 nobody can deny it. Miles Murphey & Co. owes that to Allen or to Killinger.
Q. I think I can demonstrate to the jury that Murphey and Allen got nearly all of this stuff, but I won't discuss that with you. Have not you been very desirous, and sought by all means in your power, to throw this debt on Miles Murphey & Company from Allen.
A. No, sir; all I want is the thing as it is. I never have tried any other way.
A. No, sir; all I want is the thing as it is; I never have tried any other way.
Q. You have not desired to put it on Miles Murphey & Company?
A. Unless it belonged there. I have given my evidence as ——
Q. You have not considered it, since you returned, as the debt of Miles Murphey & Company?
A. Yes, sir.
Q. Why, because they got the stuff?
A. Yes, sir.
Q. And used it, did they?
A. Yes, sir.
Q. Allen didn't get any?

A. They got the money for it; they got the entire money for it.
Q. They got it for those seven hundred hams?
A. They got the money for everything, I think. If you question the other side, they won't demur to that.
Q. I thought that Allen got the money for those hams?
A. It has all gone to the credit of Killinger. The books show.
Q. You think that Murphey & Company got it?
A. It is not denied at all, I believe, that they did get the proceeds.
311 Q. You confessed a judgment for Allen in the Superior Court of this city?
A. I confessed one to him.
Q. In his favor?
A. Yes, sir.
Q. For how much?
A. Twenty-three thousand and some odd dollars; twenty-three thousand five hundred, perhaps.
Q. When was that?
A. Well, it has been not quite two years ago.
Q. What was that levied on, if there was a levy made?
A. Well, there was a levy made.
Q. What was it levied on?
A. I don't recollect now. I don't know as I understood your question.
Q. You know what a levy and execution is?
A. Yes, sir.
Q. And a levy under an execution?
A. Well, everything I was interested in was bound for this debt.
Q. They levied on your house, furniture, and so on?
A. Not for that debt; I think for another.
Q. Did you have another confession?
A. No, sir; not another one. The property was sold I know, in the country, by a man by the name of ———; I forget his name, in Indiana.
Q. Holman?
A. Holman; yes, sir.
Q. Do you and Allen have any business transactions now?
312 A. Yes, sir.
Q. You have a partnership?
A. No, sir; he has shipped his stuff to us.
Q. To you?
A. No, sir; to the firm I am interested in—C. M. Favorite & Company.
Q. When you returned from the South you saw Allen at Des Moines?
A. Yes, sir.
Q. You stated that that execution in favor of Allen was not levied on your household furniture?
A. I think it was, since I come to recollect. It is a thing I have not thought about.

Q. Who bought it?
A. He bought it.
Q. What became of it?
A. I have it; I am using it.

Re-direct examination.

By Mr. Jewett:

Q. I will ask you, Mr. Murphey, if the firm of Miles Murphey & Company is not, or was not in 1865, subsequent to the disposition of the Des Moines stuff, and still indebted largely to Mr. Allen, and whether they were not, after all the Des Moines stuff had been disposed of, largely indebted to Mr. Allen, after all the credits that had been given to him?

A. Yes, sir; and are at this time.

Q. Still are?

313 A. Yes, sir.

Q. Miles Murphey & Company?

A. Murphey & Company. I think Mr. Allen has our notes now signed by the boys—Robert and Dick—Miles Murphey & Company.

Q. Indebted independently of transactions occurring out of the pork packing and commission business?

A. Yes, sir.

Q. Independently of the sale transactions?

A. Yes, sir; Allen has a note at this time.

Q. Has there ever been any question, to your knowledge, by any of the parties, that Miles Murphey & Company owed the balance that Killinger is claiming, to somebody?

A. No; they have never pretended to deny it.

Q. Is that the fact?

A. That is the fact; yes, sir.

Re-cross-examination resumed.

By J. H. Roberts, esq.

Q. Didn't Miles Murphey & Company give a note for ten thousand dollars, which was supposed to cover everything they owed Mr. Allen?

A. That was in my absence; that note.

Q. Have you not learned that fact since you came back, and from Allen?

A. Yes, sir.

Q. This large indebtedness from Murphey & Company,

314 growing out of other transactions—I see that Mr. Allen shakes his head—but we will prove that, I think, to be so; this large indebtedness was from Murphey & Company to Mr. Allen.

A. I forget what the note is; there is a note signed Murphy & Company, and one Miles Murphy & Co.

Q. Does the note of ten thousand dollars represent all the indebtedness you did not pay at the time of Miles Murphy & Company to Allen?

A. Yes, sir, on the house out here. I would like to tell what it is; I most forget. When this house was sold Allen bought the house, I think; but Dick can state exactly about that; I don't recollect. He took up, I think, twenty thousand dollars, some pretty large amount. When he bought the packing-house he took of Miles Murphy & Company's paper; this was on a certain thing outside; it is a thing you can get at exactly through him, but I don't know just how it is; but that debt has since been liquidated. Allen bought the packing-house, and when he bought it he cancelled so much paper—I think twenty odd thousand dollars—twenty-six or seven thousand, I don't recollect positive. I don't recollect certainly.

Q. The balance which he claimed due him was $10,000, for which they gave the note?

A. The note was previously given.

Q. Supposed to cover all the debt?

A. That is what they told me.

315 B. F. Allen, recalled for the defendant, was examined by Mr. Jewett, and testified as follows:

Q. Now, you have seen the report of the testimony, and you desire to make one correction of a statement since you didn't understand the question. I will, therefore, read that part of the report which relates to it, and then ask you. It is as follows: "Haven't you just stated that none of these parties were authorized to draw any money?

"Ans. That is my understanding.

"Q. You were to have it sold, and then to make the settlement at Des Moines?

"Ans. I considered that the meat was held for the advances that was made; that the way I looked at it. I was holding it as security.

"Q. Selling it and holding the proceeds as security for your advances; that is what you understood?

"Ans. Yes, sir."

State if you have any explanation to make about that.

A. When you asked me the question I didn't notice the "selling" in there. It was not the understanding that it was to be sold. I am positive about that. At the time I didn't notice that the question said "selling." He asked me if it was not understood I was to "sell" it, and so on. I didn't notice that "selling" was in it when I answered this.

Which was all the testimony offered on behalf of the said defendant.

And the said plaintiff, further to maintain the issue upon his part, offered the following testimony:

316 David Killinger, recalled on behalf of the plaintiff, was examined by Mr. Roberts, and testified as follows:

Q. The deposition has been read of a man by the name of McVicker; you remember him up there at the packing-house?

A. I remember of seeing him a few times.

Q. He states that this stuff was shipped to E. F. Murphy on your

account, at your direction, by him; and that you gave him the directions to so ship it at the time?

A. I never spoke a word to him about shipping anything nowhere.

Q. Are you clear about that?

A. Yes, sir.

Q. What transactions had you with McVicker there that you remember?

A. Nothing but getting the receipts of him in the office, and I was not in the office two minutes.

Q. All the directions given with reference to shipments, etc., were with Allen, were they?

By Mr. Jewett.:

Wait a moment.

A. Yes, sir.

Q. You are enabled, from looking at your papers, to fix the time that you went away from here to go back home?

A. Yes, sir.

Q. What memoranda have you got?

A. A book that I bought stock in at the yards.

Q. What is the date?

317 A. The second day of March I bought the last shipment of hogs.

Q. 1865?

A. Yes, sir.

Q. When did you leave after that?

A. A day or two after that. I made a mistake in giving that. I thought it was the 10th or 12th, but I find it must have been the 3rd or 4th of March.

Cross-examination.

By Mr. Jewett:

Q. How often were you at the packing-house and saw McVicker?

A. I think I was as many as three times is as often as I can remember I was there. I saw McVicker twice, and the third time I didn't see him.

Q. You were hurrying up your stuff as fast as you could?

A. No, sir.

Q. Didn't you make any effort to hurry it up?

A. I didn't; every man had to take his turn the same as you would at the mill, and I knew that.

Leander E. Murphy, recalled for the plaintiff, was examined by Mr. Roberts, and testified as follows:

Q. Do you remember these 700 hams that were sent out to Duffield's smoke-house for Mr. Killinger?

A. I cannot remember any different lots; my books show

318 whose hams they were.

Q. By whose directions did you send those hams there?

A. B. F. Murphy.

Q. Would you have sent Killinger's hams there without his directions?

A. I sent nothing out of the house without his orders.

Q. You sent nothing out of the house?

A. Nothing of the stuff of Murphy & Allen, of the Des Moines stuff; any of our own pork, why——

Q. You were not asked, as were the other two witnesses, on the direct examination, what was your understanding of this agreement here with reference to commissions. I will ask you to state now.

(Objected to.) Sustained.

Cross-examination.

By Mr. Jewett:

Q. Do you remember, Mr. Murphy, of receiving any special directions from B. F. Murphy about these 700 hams, as to what lot they should be taken out of, or the hams to forward generally?

A. Murphey always came to the house and said that he sold so and so; and also stated that he wanted it delivered out of certain lots, and asked if I had the different lots. If I had, I delivered.

Q. That was the general course of the business?

A. Yes, sir.

Q. Of all the business through your packing-house?

A. That was the Des Moines stuff.

319 Q. Wasn't that the general way in which the business in the house was prosecuted?

A. If he said any stuff belonging to Miles Murphy & Co., I delivered it out of what I thought proper.

Q. Of his own stuff?

A. All of his own stuff was subject to his orders.

Q. And sold in the same way?

A. Yes, sir.

The foregoing is all the testimony presented on the trial of said cause, and after the arguments of counsel, the court charged the jury in substance as follows:

"The first question is as to the agreement of the parties. Were the hogs delivered to the defendants to be cut, packed, and transferred to Chicago, and sold by the defendants, or was it the agreement that the hogs should be delivered to defendants to be cut and packed and transferred to Chicago to be sold by agents? Were the hogs to be sold by defendants, or by an agent of defendants? This is a question of fact to be determined by the testimony. The direct testimony comes from the parties themselves; both have been examined. You are to weigh this testimony, and judge of it for yourselves."

And to this portion of the charge of the court the defendants, by their counsel, then and there excepted.

The court further charged the jury in substance, as follows:

"Was the contract to slaughter, sell, and account to the plaintiff as upon a sale or agreement to sell? The responsibilities of

320 the defendants are such as arise upon the facts applicable to

the case, as stated by the plaintiff in the declaration. This is stated in three ways.

1st. That the hogs were delivered to the defendants to be slaughtered, cut, packed, and sold, and the proceeds thereof to be accounted for to the plaintiff, and that they were so slaughtered, cut, packed, and sold, but that the defendants have failed to account for and pay over the proceeds.

2d. That the hogs were delivered to defendants, to be by them slaughtered, cut and packed, and sold for account of the plaintiff, when directed so to do by the plaintiff; that the plaintiff directed the defendants to sell the pork, but they neglected to do so, and subsequently sold for a less price than they might have obtained therefor, and plaintiff claims the price at the time the order to sell was given.

3d. That after the hogs had been slaughtered, cut, and packed, the defendants, negligently kept the meat in their possession until the price declined, and sold the same at a great sacrifice, and then refused to account and pay over the moneys to the plaintiff.

If either of these claims of the plaintiff is established by the evidence, the plaintiff is entitled to recover. But if the defendants agreed to transfer the product of the hogs to an agent, to be sold for the benefit of the plaintiff, then, if they acted in good faith and selected agents of good standing and credit, they would not be responsible because Miles Murphey & Co. turned out to be insolvent.

The complications of the case grow out of the fact that B. F.
321 Murphey was a member of both firms. There is no doubt, if you believe the testimony, that the defendants were confessedly partners in the packing-house, and slaughtering.

It is claimed they were not partners in the selling. This is for you to say under the evidence; private agreements between the parties are unimportant. How did they hold themselves out to the world and to the plaintiff?

And to this last portion of the charge of the court, the defendant, by their counsel, then and there excepted.

And the court thereupon further charged the jury in substance, as follows:

"It is important to bear in mind the conceded fact in respect to the interest in the commissions. This was in consequence of an arangement between Miles Murphey & Co. and B. F. Murphey, as a member of the firm of Murphey & Allen."

The court then further charged the jury, as follows:

"But the main question is, was it the arrangement to transfer the pork to Chicago to be sold by a house there, no matter what house? If so, good faith relieves the defendants from responsibility. If you find that there was no agreement that the pork was to be sold by Murphey & Allen, the plaintiff's case fails. If there was an agreement that Murphey & Allen had to sell, then has that agreement been modified, changed, or abandoned; that is the only other view. The only testimony is that of the parties, except the testimony of an employee of Murphy & Allen, and that does not relate to the agreement, but only to Killinger's directions. Was there a change?

322 If the contract was as claimed by the plaintiff, did he expressly or by implication, change it? If he understood that Murphy & Allen were to sell, did he afterwards agree to a sale by Miles Murphy & Co."

And to this portion of the charge of the court, the defendants, by their counsel, then and there excepted.

The court then further charged the jury, as follows:

"Something has been said by counsel to which I ought to call your attention in respect to the property in the pork. The property was not changed. The pork, as well as the hogs, belonged to the plaintiff. The defendants had a lien or claim on it for the expenses of cutting, &c. That was a claim and lien. The plaintiff could pay that at any time and demand a sale. He could ask a sale of the pork to pay it, and get proceeds. This is all that was meant. Therefore there was nothing inconsistent with the general aspect of the case in allowing the plaintiff to do this. It is always the right of the owner of property held in this way. When such claims are paid, the owner controls the property. The direction to pay the money into the Fifth National Bank is wholly immaterial matter."

And to this last clause of the charge of the court, the defendants, by their counsel, then and there excepted.

The court further charged the jury, as follows:

"Do you believe there was any change in the agreement of the parties? The defendants are responsible, as you may find the facts to be, whether they agreed to sell, did sell, and failed to account for and pay over proceeds; whether they agreed to sell and did
323 not, or did not sell for the best price. It is a broad question of fact. Do you believe the testimony of Killinger to be true? or how, if at all, is it affected by the testimony of Allen and McVickar? Of course you must find against both defendants or neither of them."

And to this portion, and to the whole of said charge of the court, the defendants, by their counsel, then and there excepted.

The above does not comprehend the whole charge of the court, and the court left it to the jury to say, under the evidence, what was the nature and character of the contract, if any, between the parties, and whether the defendants were jointly liable, instructing the jury if they did not believe from the evidence that the contract, as alleged, was proved, and that both defendants were parties to it, they could not find a verdict for plaintiff.

[SEAL.] THOMAS DRUMMOND.

Endorsed: Filed April 2d, A. D. 1867. Wm. H. Bradley, clerk.

324 And on this day, to wit, the thirteenth day of June, in the adjourned May term, A. D. 1867, of said court, in the record of the proceedings thereof, in the said entitled cause, is the following entry, to wit:

Record.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY AND BENJAMIN F. ALLEN } Assumpsit.

Now come the parties by their attorneys, and now comes on to be heard the motion of the defendants heretofore entered herein for a new trial of this cause, and, after hearing a part of the arguments of counsel, the hour of adjournment having arrived, the further hearing is postponed until to-morrow morning.

325 And on this day, to wit, the fourteenth day of June, A. D. 1867, came the respective attorneys in the said entitled cause, and filed in the said clerk's office their mutual stipulation in the said entitled cause, which said stipulation is in the words and figures following, to wit:

United States Circuit Court, northern district of Illinois.

Stipulation.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY AND BENJAMIN F. ALLEN. }

It is agreed, that if the defendants motion for a new trial shall be denied, judgment shall be entered as of this date, or that interest shall be computed on the verdict to the date of judgment and incorporated therein, whichever the court may order and direct, and saving to defendants all right of exception and appeal.

APRIL 20, 1867.

GOOKINS & ROBERTS,
Pl'ffs' Att'ys.
JNO. N. JEWETT,
Att'y for Def'ts.

Endorsed: Filed June 14, 1867. Wm. H. Bradley, clerk.

326 And on this day, to wit, the fourteenth day of June, in the adjourned May term, A. D. 1867, of said court, in the record of the proceedings thereof in the said entitled cause, is the following entry, to wit:

Record.

DAVID KILLINGER
vs.
BENJAMIN F. MURPHY and BENJAMIN F. ALLEN. } Assumpsit.

Now come again the parties, by their attorneys, and after hearing the concluding arguments of counsel upon the motion of the defend-

ants heretofore entered for a new trial of this cause, the court overrules said motion. It is therefore considered and adjudged by the court that the said plaintiff do have and recover of the said defendants the said sum of nine thousand seven hundred and fifty-nine dollars and sixty-four cents, his damages so as aforesaid assessed, together with his costs and charges by him about his suit in this
327 behalf expended, amounting to the sum of sixty-two dollars and five cents, and that execution issue therefor; and by agreement of the parties, by their attorneys, as per stipulation filed, it is ordered that said judgment be entered as of the twentieth day of April last, without prejudice to the rights of the parties.

On this day, to wit, the 24th day of June, A. D. 1867, came said defendants and filed their appeal bond in said entitled cause,
328 which is in the words and figures following, to wit:

Supreme Court of the United States.

BENJAMIN F. MURPHY & BENJAMIN F. ALLEN
vs.
DAVID KILLINGER.
} In error.

Know all men by these presents that we, Benjamin F. Murphy, Benjamin F. Allen, and William F. Coolbaugh, are held and firmly bound unto the above-named David Killinger in the sum of fifteen thousand dollars, lawful money of the United States, to be paid to the said David Killinger, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated this 15th day of June, A. D. 1867.

Whereas the above-named Benjamin F. Murphy and Benjamin F. Allen have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the Circuit Court of the United States for the northern district of Illinois: Now, therefore, the condition of this obligation is such, that if the above-named Benjamin F. Murphey and Benjamin F. Allen shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be
329 and remain in full force and virtue.

[SEAL.] BENJAMIN F. MURRPHEY.
[SEAL.] BENJAMIN F. ALLEN.
[SEAL.] W. F. COOLBAUGH.

Approved.

THOMAS DRUMMOND.

Endorsed: Filed June 24, 1867. Wm. H. Bradley, cl'k.

NORTHERN DISTRICT OF ILLINOIS, *ss.*

I, William H. Bradley, clerk of the Circuit Court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said entitled cause in said court, wherein David Killinger is plaintiff and Benjamin F. Murphy and Benjamin F. Allen are defendants, as the same appears of record remaining my custody.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Circuit Court at my office, in the city of Chicago, this thirtieth day of November, A. D. eighteen hundred and sixty-seven, and of our independence the ninety-second year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[5-ct. U. S. rev. stamp.]

Circuit Court of the United States.

NORTHERN DISTRICT OF ILLINOIS, *ss*:

The United States of America to the judges of the Circuit Court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said court before you, between David Killinger, plaintiff, and Benjamin F. Murphy and Benjamin F. Allen, defendants, a manifest error hath happened to the great damage of the said Benjamin F. Murphy and Benjamin F. Allen, as by their complaint appears: and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the law and custom of the United States, should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-first.

[SEAL.] WM. H. BRADLEY, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

To David Killinger, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Wash-

ington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the northern district of Illinois, wherein Benjamin F. Murphey and Benjamin F. Allen are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas Drummond, judge of the Circuit Court of the United States for the northern district of the United States, this 22d day of June, in the year of our Lord 1867.

THOMAS DRUMMOND.

334 Service of a copy of the within acknowledged this 24th day of June, 1867.

GOOKINS & ROBERTS,
Att's for Killinger.

Endorsd: Benjamin F. Murphy *et al. vs.* David Killinger. Citation.

UNITED STATES
SUPREME COURT.

DECEMBER TERM, 1868.

BENJAMIN F. MURPHEY AND
BENJAMIN F. ALLEN,
Plaintiffs in Error,

vs.

DAVID KILLINGER,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

Argument for the Defendant in Error.

HAMLETT & REED, Printers, 90 Washington Street, Chicago.

UNITED STATES
SUPREME COURT.

DECEMBER TERM, 1868.

BENJAMIN F. MURPHEY AND
BENJAMIN F. ALLEN,
Plaintiffs in Error,

vs.

DAVID KILLINGER,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

Argument for the Defendant in Error.

It will be seen from the record, and the argument of the counsel for the plaintiffs in error, that the chief, almost the only question in issue in this cause, was, not the fact of the partnership of the plaintiffs in error, (for that was admitted,) but whether the transaction out of which the cause of action grew was within its scope.

The facts, so far as they are undisputed, are, that in November, 1864, the plaintiffs in error, as partners, at DesMoines,

Iowa, were engaged in the business of slaughtering hogs, rendering lard, packing pork, and selling the product. Allen resided at DesMoines and Murphey at Chicago, where he was a member of the firm of Miles Murphey & Co., or Murphey & Co.* At the time mentioned, Killinger had a drove of hogs, some six hundred or upwards, near DesMoines, bound for Chicago. Meeting with Allen, he was requested by him to have his hogs slaughtered in their establishment, instead of driving and shipping alive. The interview resulted in a contract. The parties do not fully agree as to the nature or extent of that contract. The hogs were put into the slaughtering establishment of Murphey & Allen, were slaughtered, the lard rendered, and the product sent to Chicago for sale. It was consigned to B. F. Murphey. It was sold at Chicago through the house of Murphey & Co. Murphey & Allen slaughtered and packed hogs of their own, and of several other parties, the product of which was shipped to B. F. Murphey, and sold by Murphey & Co. Murphey & Allen had an agreement with Murphey & Co. that their shipments from DesMoines should go through the house of the latter, and that the customary commissions of two and a half per cent. on sales should be divided between them, in the proportions of one and a half to Murphey & Allen, and one to Murphey & Co. About April 10, 1865, Murphey & Co. failed: B. F. Murphey, Allen's partner, absconded. Allen came to Chicago, and settled with Murphey & Co. In doing so he took the one and a half per cent. commissions on all the pork and lard sent from DesMoines, except upon Killinger's, which he declined. Killinger was at Chicago two or three times during the season, and gave directions to have the money produced from the sale of his pork deposited at the Fifth National Bank. No money was ever so deposited, and he has never been paid.

Thus far, we believe, the parties agree. As to the facts upon

* This firm, in consequence of a change which occurred in it, is sometimes called Murphey & Co., and sometimes Miles Murphey & Co. This change involves no question in the present case, and we shall call it Murphey & Co. to avoid repetition.

which they disagree, we shall have no occasion, since the finding of the jury, to refer to them, except, perhaps, incidentally, while discussing the questions of law.

The controversy grows, of course, out of the failure of the house of Murphey & Co.

The plaintiffs in error assume three positions.

1. That the contract made at DesMoines did not extend beyond the slaughtering and packing at that place. That it had nothing to do with the selling; or,

2. If it did extend to the selling, it was the individual contract of Allen, (who did the talking with Killinger, at DesMoines,) and that Murphey was no party to it; or,

3. If it was the contract of Murphey & Allen, and if it extended to and included the selling, Killinger, by some subsequent act discharged them from its obligation.

These are purely questions of fact. Every one of the partners of both firms, five in number, was a witness, and testified orally before the jury, who found for the plaintiff, and the only inquiry is, whether these questions were properly submitted to them.

The first point made by the counsel for the plaintiffs in error, is as to certain evidence offered by the plaintiff below, and, as it is claimed, erroneously admitted.

Miles Murphey being upon the stand, was called upon to state a conversation had between himself and Killinger, when neither B. F. Murphey nor Allen was present. Objection being made by the defendants below, to this, as hearsay evidence, the plaintiff's counsel stated that he expected to follow it up with proof that the plaintiff had been sent by one of the defendants, to the witness, "with reference to these hogs." On this statement of

counsel, which is in accordance with our usual practice, the objection was overruled. The witness then testified that Killinger said to him, that "he had come down to hunt his money, and that he had placed some hogs in Allen's hands at Des Moines."

The counsel for the plaintiffs in error, does not object that the counsel for the plaintiff below did not redeem his pledge. He did redeem it, very fully, as will be seen by reference to the testimony of Killinger, p. 30, where he rehearses the interview with B. F. Murphey, in Chicago, his urging him to go to the witness, *to try to get his money from him*, his refusal for a long time to go, saying it would avail him nothing; Murphey's pressing him to go, and finally going to his hotel, taking him in his buggy, and carrying him to the depot, his going down to Indiana, the interview with Miles Murphey, and this same conversation rehearsed by Killinger *without objection* from the defendant's counsel.

The points made in argument are,

I. That inasmuch as it was not, (as is assumed), "*information*," that Killinger was sent for, but only *money*, it was not competent to prove that he asked for it, that he did not get it, and what was said on the occasion. Indeed, the pith of the objection is, that the plaintiff's counsel, in stating what he expected to prove, did not use the words, "for information."

II. That both the defendants did not unite in the sending of Killinger on this mission.

In answer to the objections here raised, we say:

I. The testimony elicited amounts to nothing, and could have had no influence upon the verdict. Killinger told Miles Murphey "he had come to hunt his money." Murphey replied that "he had none for him." What does that amount to?

The counsel has mistaken his point. The principle of his rule is this: When one refers to another for information, he accredits that other to speak for him, and in effect makes the information given, his own. He speaks himself through the mouth of the person referred to. But this is an act. It is part of the *res gestæ*. Killinger was sent for money. What was said in doing the errand was part of the act itself. It characterizes the act, and this was very important. Killinger all the time insisted that Murphey & Allen, and not Murphey & Co., were liable to him, and he for a long time refused to go to Miles Murphey, but consenting, if not willing, to try all expedients, however unpromising, to get his money, he finally went. This act might have been turned against him, as Murphey & Allen were endeavoring to do, by showing that he had recognized Murphey & Co. as his debtors instead of themselves, if he was not allowed to show what really did take place; and the language used was much the most important part of the whole transaction, for the purpose of showing its true character.

The objection seems to be a criticism upon the statement of the plaintiff's counsel, as to how he would make the defendants answerable for this errand. He did not say he expected to prove Killinger was sent to the witness "for information." Argument page 7.

We have never before seen a point of this *size* made in the Supreme Court of the United States, for the reversal of a judgment, but our practice here is limited, and they may be very common.

2. It is further objected that Mr. Allen is not shown to have had any hand in sending Killinger to the witness.

It was not our expectation to make out our whole case by proof of this interview between Killinger and Miles Murphey. It is quite unusual for all the partners of a firm to participate in every

transaction which affects the firm, particularly when they reside in different states. No doubt there must be evidence enough in the case to show the joint liability, as one cannot make another his partner by his own statement. But suppose they both, at different times, make statements or do acts that show them to be partners, or the nature and extent of their partnership, as the case may be, then all the acts and declarations of both are admissable.

It is argued, p. 9, that Allen's connection with the business had not been shown when the witness testified. True, but when several distinct acts and declarations are relied on to show a partnership, all cannot be first in the order of proof; and it the party offering the evidence, fails to adduce enough to, in the opinion of the court, submit the question to the jury, the opposing counsel may ask to have the evidence stricken out, which the counsel did not do, for he plainly saw that the evidence was abundant for this purpose.

It is argued, seriously, we must suppose, that error intervened on the trial below, by the putting of a leading question to a witness. Argument p. 9.

The form of a question put to a witness is so much a matter of discretion with the court trying the cause, that we do not remember to have seen a judgment reversed in this court, simply for the cause here assigned. But, it should be remembered that it is the answer, and not the question, that does the mischief, if any is done. A leading question is one that may be answered with "yes," or "no." No such answer was given.

It is complained however, that it elicited improper evidence, to wit, what the witness said to Killinger on that occasion. It is a familiar rule of evidence, that the whole of a conversation relating to the matter in issue, is to be given, if any; but independant of this rule, we perceive nothing objectionable in the testimony. The witness told what he understood about Kellinger's

meat, that it came in the same as the other DesMoines meat. If this was objectionable, in any sense, the witness was there upon the stand, subject to a cross examination, as to what the transaction really was, and as to his understanding of it.

The next point made by the plaintiff in error, p. 10, is that the witness, Miles Murphey, was permitted to testify what B. F. Murphey told him in reference to the extent of the partnership. It is insisted that the declaration of one partner is not admissable for this; referring to Collyer, Sec. 776.

It is true, as stated under the last point, that the fact of partnership, or the nature and extent of it, cannot be proved by the declarations of one partner. But suppose Mr. Murphey one day makes a statement of this kind, and Mr. Allen the next day makes an equivalent statement, or does acts of the kind indicated by the statement of Murphey, does Mr. Collyer or any one else pretend that a partnership cannot be proved by the concurrent declarations or acts of both? Certainly not, and that is just this case. When Allen besought Killinger to put the hogs into the hands of the firm at DesMoines, a very material inducement which led Killinger to yield to Allen's persuasions, was the representation that he had a partner in Chicago, through whom they could be sold. The question with Killinger was whether he should drive and ship alive, or pack at DesMoines, and according to Killinger's testimony, p. 21, he said to Allen, "If I pack the hogs here and give them to your slaughtering establishment, I look to you to see me through, and pay me when the thing is through," says he: "I will do that." Allen, does not deny this. On the contrary, he admits, p. 88, that as to the arrangement with Murphey & Co., for the sale of the DesMoines pork, and a division of the commissions, he either authorized it, or consented to it after the arrangement was made, and p. 90, he says the arrangement was made, before they shipped. Moreover, Allen himself actually took a note from Murphey & Co.,

covering the proceeds of Killinger's pork, and says they had a right to charge it in that way, p. 91–2, and a year after he entered a credit on the note of $4000, p. 92,–3, and there was much more evidence of the same kind. Now, what we say is, that there was proof enough of the acts and declarations of both parties to justify the submission of the whole to the jury, and it was for them to say whether the Chicago part of the transaction, that is, the sale, was embraced within and covered by the contract. According to the theory of the plaintiffs in error, they might make any number of declarations, or do any number of acts indicating the nature and extent of the partnership, and if they never happened to be together when these were done, they could not be given in evidence, a proposition too absurd to need refutation or argument.

Objections are taken to the charge of the court.

It is insisted that the court wholly misapprehended the character of the case, and failed to give proper instructions. The ready answer is, that if those given were not satisfactory to the defendants they should have asked others, and if refused, should have taken their exception to the refusal.

As this complaint of the failure to give proper instructions, constitutes the staple of the argument of the counsel, so far as it relates to the charge, it is a little remarkable that he overlooked so obvious a rule of practice.

Inasmuch, however, as the counsel admits, that the charge "taken by itself in a proper case is free from objection," the only way of applying to it the proper test, is to examine the evidence; and it is scarcely less remarkable that this the counsel has wholly failed to do, contenting himself in this regard by a reference to the pleadings, which really throw no light upon the subject at all, except to show imperfectly what evidence might have been, and not what evidence was, given.

Specifically, the first objection to the charge, is, that the Court, while directing the attention of the jury to the nature of the original contract, instructed them to inquire whether "the hogs were delivered to the defendants to be cut, packed and transferred to Chicago, and sold by the defendants; or was it the agreement that the hogs should be delivered to the defendants to be cut and packed, and transferred to Chicago to be sold by agents? Were the hogs to be sold by the defendants or an agent of the defendants, p. 142, that is, an agent selected by the defendants. As further explained, p. 143, the point was made unmistakeably clear, by stating to the jury, that "If the defendants agreed to transfer the hogs to an agent, to be sold for the benefit of the plaintiff, then, if they acted in good faith, and selected agents of good standing and credit, they would not be responsible, because Miles Murphey & Co. turned out to be insolvent." That the complications of the case grew out of the fact that B. F. Murphey was a member of both firms, "There is no doubt," said the Court, "if you believe the testimony, that the defendants were partners in the packing house and slaughtering. It is claimed they were not partners in the selling. This is for you to say under the evidence."

Now, when counsel undertake to criticise a charge, and make the broad statement that the Court has wholly misapprehended the character of the controversy, how much fairness is there, nay, how much justice, in selecting out a single line, or a brief sentence, assuming that to be the change, while omitting all the rest, and especially that part which fully and fairly placed before the jury the point in issue.

If we look at the evidence, we shall see that there was not one word of testimony from beginning to end, to indicate that the DesMoines firm were not to send the hog product to Chicago for sale. That was the condition on which Killinger delivered the live hogs into their hands. Allen has no where denied the agreement, as sworn to by Killinger. No word was ever uttered that Killinger's pork was to be an exception from that of Murphey & Allen, Barnes & Co., Hoyt & Sherman, Sherman &

Hays, Sypher and John Hays, (p. 58), whose stuff was sent forward for sale, in respect to the sharing in the commissions, until after Murphey & Co. failed. It was, like all the rest, shipped to B. F. Murphey. *Id.* B. F. Murphey made the agreement with Murphey & Co., for the division of commissions, and, finally, Allen himself testifies that the way in which he considered that he was "let out" was by Killinger coming to Chicago, and taking charge, as far as he could, and told them what to do with the money, p. 102. His language is: "*I thought by taking the money he was taking the thing out of my hands, and I had no further settlement to make with him.*" We need not stop to ask how he could be "let out" of the obligation of a contract he had never been in, or how the pork could be "taken out of his hands" at Chicago, if the original contract did not include the disposition of it. With all this evidence, and not a word to contravene it, it is useless to pretend that the sale of Killinger's stuff did not enter into the contract, and it would have been wrong, and would have tended to mislead the jury to have put to them a supposititious case, assuming that their engagement extended only to the slaughtering and packing.

It is not the function, we respectfully submit, of an appellate court or even of counsel, to criticise the style, the rhetoric or even the precise grammatical construction of the language of the inferior court in delivering a charge. The question is: have the facts been fairly laid before the jury, and the principles of law applicable to them.

The next exception taken to the charge is, that the court told the jury that "private agreements between the parties are unimportant." Here again the language excepted to is seperated from that in immediate connection, and sought to be preverted into a proposition that the terms of a partnership are to be disregarded. What was the language in immediate connection? It was this: After stating to the jury how the complication arose, by B. F. Murphey being a member of both firms, his Honor proceeded: "There is no doubt if you believe the testimony, that the

defendants were confessedly partners in the packing house and slaughtering. It is claimed that they were not partners in the selling. This is for you to say under the evidence. Private agreements between the parties are unimportant. How did they hold themselves out to the world and to the plaintiff?" Here their private agreement is placed in contrast with their manner of doing business, and the latter, the jury are told, must be looked to for the purpose of determining their liability. Is there any sounder law than that? If there is, we do not know where to look for it.

This breaking of the idea by separating a line or sentence from the context, while it betrays, as we think, a conscious weakness in respect to the position assumed, often entirely perverts and changes that which was intended to be expressed. There is a passage in the Bible which when separated from its connection, declares that "There is no God," but restore it to its proper relations, and instead of being the language of inspiration, it is found to be the assertion of a fool.

The next objection taken to the charge, (argument p. 15), is a complaint that the court omitted to say what the counsel thinks ought to have been said.

This is, of course, nothing but a criticism; it is not, and cannot be the discussion of a question of law. Suppose the court were to deliver no charge at all, is it pretended that an exception to its failure to give instructions can be assigned for error?

We understand that errors upon instructions can be assigned only upon those given, and those prayed and refused. The absurdity of the point made, appears in the fact that the charge complained of, states a proposition, or rather, two of them, the finding of either of which would decide the case *for the defendants*. If the pork was not to be sent to a house in Chicago for sale, or, if the contract originally included the sale, and Killinger afterwards expressly or by implication changed it, by transfer-

ing the stuff to Miles Murphey & Co. for sale, in either case the defendants were *relieved from responsibility*, and still the defendant "excepts," and gravely argues here for a reversal of the judgment on that ground! We have looked carefully at the instruction, and, although given against us, we are not disposed to complain of it. We think it right.

The last exception taken to the charge of the court is, that the jury were told that "the direction [of Kellinger] to pay the money into the Fifth National Bank, was a wholly immaterial matter." With the usual facility for dissecting, this part of the instruction is, by the counsel, separated from the context, and treated as if it had no connection with it. The subject under discussion, by the court, was the third hypothesis of the defendants, that, supposing the facts to be that the original contract contemplated a sale of the product, and that sale by Murphey & Allen, Killinger had done acts by which he had discharged them from its obligation. It became necessary for the court to inform the jury what Killinger might, and what he might not do, in reference to the consignment and its proceeds. We ask attention to this instruction, p. 144, where the jury were told that the property in the pork was not changed, that it belonged to the plaintiff, that, subject to the lien of the defendant, he might direct the sale and receive the proceeds; that this control, so limited, was not inconsistent with the rights of the defendants; that such was always the right of the owner of property held in that way; that when the claims of the consignee were paid, the owner controlled the property; that the direction, [therefore,] to pay the money into the Fifth National Bank was a wholly immaterial matter.

If the court was wrong in its definition of the rights of consignor and consignee, then this instruction was wrong, and not otherwise. If, when the property is sold and all the charges paid, the owner is entitled to the net proceeds, the court was right. As the counsel has not attacked this position, we need not defend it. It needs no defense.

Going back to the evidence, the counsel endeavors to show that if any agreement was made with Allen, it was that Killinger's *money* was to take the same direction as Allen's. He quotes Killinger as saying to Allen, when the original agreement was made at DesMoines, "I am going home and, says I, you handle my pork just the same as you would your own, and when the thing is at an end, I want to settle with you and look to you for my money." Says he, "I will." Then he argues that Mr. Allen individually controlled the disposition of the product of the hogs slaughtered at DesMoines except Killinger's, by reason of advances made by him for their purchase, and this money so coming to Allen was to be deposited at the Union National Bank to Allen's credit. This reference to the testimony, we submit, is conclusive *against* the inference the counsel seeks to draw from it. Allen's money of course would go to himself, as would also that of the parties for whom he had made advances, but he had made none for Killinger. What business, then, had he, individually, with Killinger's money? Of what avail was it for one partner, to pay the money to his co-partner who had no right to it? The moment it was realized it was not to be sent to DesMoines, but to Lancaster, Pa., or, what is the same thing, put into the Fifth National Bank, to Killinger's credit, and he could go there and get his money. True, Killinger told Allen he would look to him for his money. Allen had told him he had a partner in Chicago who would do the selling. Killinger did not know Allen's Chicago partner. He was acquainted with Allen himself, with whom he had had previous dealings, and relied specially upon him because he thought he knew him. Whatever that might be worth, as an argument to the jury, on the second hypothesis of the defendants, they had the benefit of, but it had nothing to do with the third hypothesis upon which the judge was speaking.

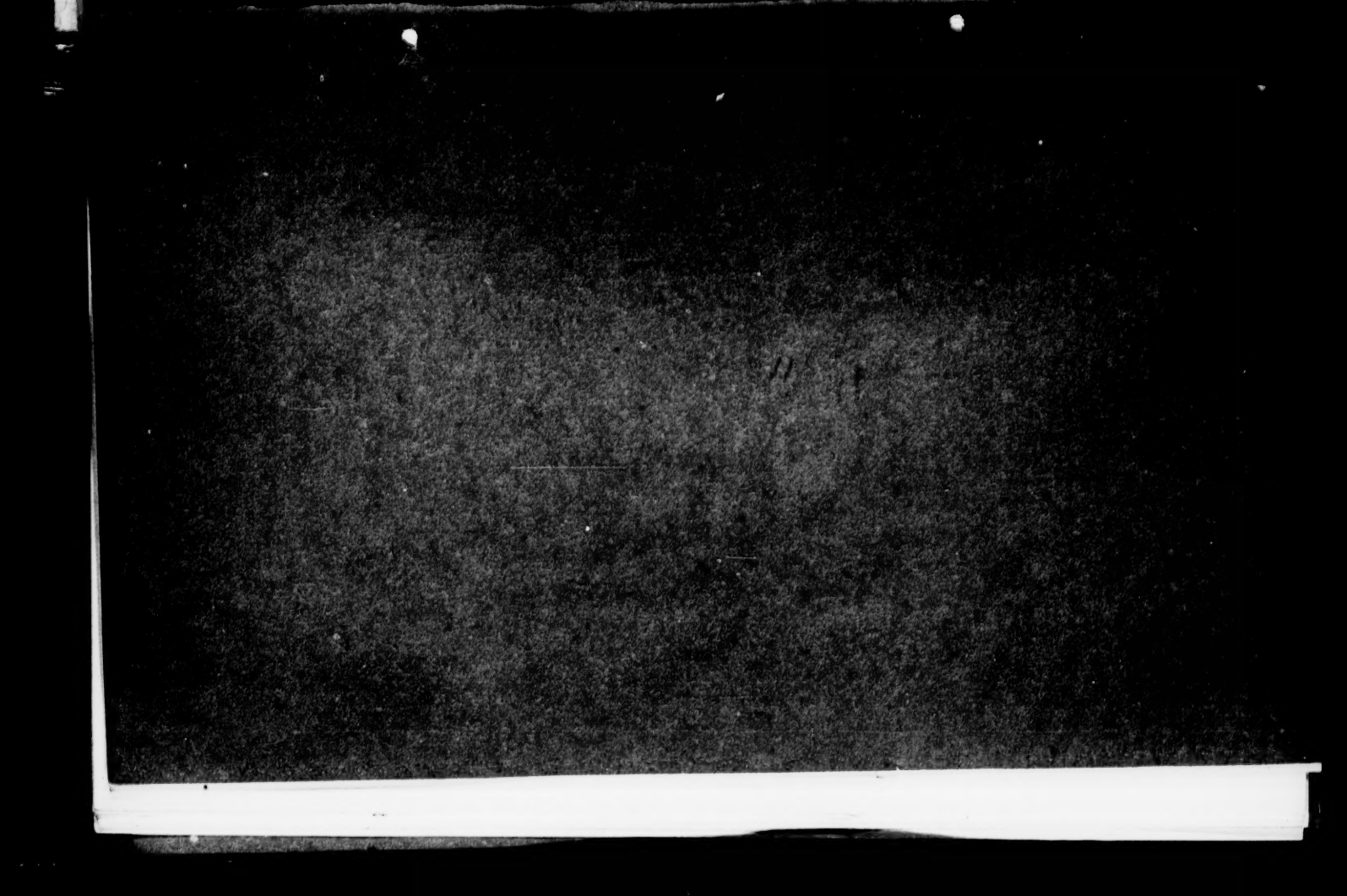
Why does not the counsel come out plainly and tell us what he is at? Does he suppose that we cannot see it? One partner ran away with the money. If, instead of running away with it, he had left it in the hands of his co-partner, the firm would not

have lost it, for, as Allen did not run away, the inference is that he would have paid it over to Killinger. We will excuse the counsel, however. He could not attack his own client. Thus far he is right.

The counsel for the plaintiffs in error closes his argument by animadversions upon the action of the judge, based upon statements outside of the record. We do not propose to follow him there, but simply to remark that upon looking at the argument of the learned counsel, as a whole, we are strongly impressed with the idea that this cause was never carried to the Supreme Court, with any expectation of reversing the judgment of the Circuit Court. His argument seems on every question to be, not an attempt to reverse a judgment, but a difficult attempt to make a point. It is an apology for the case being here, and the animus of the case is to be found in the fact that three or four year's use of Killinger's money at six per cent. interest is, for the leading banker of Iowa, a pretty good thing.

GOOKINS & ROBERTS,

Attorneys for Defendant in Error.



IN THE

Supreme Court of the United States.

BENJAMIN F. MURPHEY ET AL.
vs.
DAVID KILLINGER.
} In Error.

REPLY TO ARGUMENT OF DEFENDANT IN ERROR.

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The counsel of defendant in error, io their argument, have indulged themselves in great latitude of criticism and ridicule. I will not object to that style of discussion, especially, as here, it is the only kind which their case admits of, neither will I undertake to revenge myself, in reply, to cynical allusions to the points of the learned counsel, or to the errors complained of in the proceedings and charge of the Court below.

The general statement of agreed facts contained on the first and second pages of the argument of defendant in error, may be assented to, with one exception. The firm of Murphey & Allen was not interrested in the commission of 2½ per cent. for selling the Des Moines meat—at least so both Allen (Record 80,) and B. F. Murphy (Rec. 115) testify. Both say that this commission was shared between Allen and the firm of Miles Murphy & Co. Allen and not Murphy & Allen, controlled the Des Moines meats (except Killinger's), because of the advances made thereon by him. This being at least a part of the evidence on the subject, it is not proper to speak of the division of the commission of 2½ per. cent. between Murphey & Allen and Murphey & Co., as an undisputed fact. This correction may or may not be material, but nothing, certainly, is lost to justice by a statement of things as they are.

It may be that the *Points* made by the plaintiffs in error upon and in connection with the testimony of Miles Murphey, are not so large, and do not involve so many difficult questions, as the learned counsel for the defendant in error are in the habit of discovering. More important questions are, I know, submitted to and decided by this Honorable Court, but, I have yet to learn, that the *size* of a point, or more properly speaking, the magnitude of the error committed in the Circuit Court determined its right to recognition, even in the Supreme Court of the United States. If the error was committed, no matter how small it may have been, if the Court cannot say that it had no influence upon the result, the judgment is infected thereby, and must, for that reason, be reversed. I am aware, also, that this Court does not review questions of fact, as such, and that it will ordinarily take no further notice of the testimony than is necessary to determine the correctness and applicability of the law, as laid down in the rulings and charge of the court below. I suppose, therefore, it will not attempt to say that improper testimony, admitted against objections, bearing upon a material issue in a cause, had no influence in determining the minds of the jury ; or, illustrating: if three witnesses are swear and give evidence upon a single disputed fact—two upon one side and one upon the other—in such a case, if the testimony of one of the two was incompetent, and was objected to for that reason, but yet admitted, the judgment rendered upon the evidence of the two against the evidence of the one witness, should for the error, in overuling the objection, be reversed ; for the court cannot say, what influence the improper testimony may have had in determining the result, nor will it say, because the jury might have found in the same way upon the opposing statement of two witnesses, that this possibility shall cure the error in admitting the third to testify.

The principle of the rule under which the conversation between the witnesses, Miles Murphy and Killinger, is claimed by counsel for the defendant in error to be admissible, is well stated by the counsel, in this language : "When one refers to another *for infor-* "*mation*, he accredits that other to speak for him, and in effect

"makes the information given his own. He speaks himself through "the mouth of the person referred to." Tested by this rule, the conversation should have been excluded. Counsel say Killinger was sent to Miles Murphy to get his money — admitted — and conceding it to be proper to show the sending and the purpose of it, as stated, it would undoubtedly be proper to show the result of his mission, viz: that he did not get the money; but, by no rule of evidence ever yet announced, except in the brief of the counsel, would it entitle Killinger to put into the mouth of Murphy, to be repeated by him on the witness stand, his version of the arrangement between himself and Allen, or bind Murphy & Allen by the declarations which Miles Murphey might make as to the liability of Murphy & Co. The conversation, as given, I admit is loose and rambling, such as might become a man hesitating between the truth and his own responsibility, but in its substantial ignoring of liability to Killinger on the part of Murphy & Co., and its partial avowal of the direct responsibility of Murphy & Allen, it contained the virus which might, and doubtless did, in the very beginning of the trial, poison the minds of the jury.

But the counsel altogether mistakes the point of objection to this conversation. It is not denied that one person may thus accredit another to speak for him; but it is denied that the statement of counsel, which is put in the place of proof, shows such an accrediting. And it is insisted that this statement is materially defective as a foundation for the admission of the evidence objected to. Nor can the counsel jump from this statement to the proof offered in redemption of the pledge which the statement contained; and if he could, that would be found to be equally defective, for it nowhere appears that B. F. Murphey sent Killinger to Miles Murphey *for information* concerning any matter in issue in this suit, or that Allen had any knowledge of, or was in any manner concerned in, the sending of him for any purpose.

Until I read the Brief of the learned counsel for defendant in error, I had never heard or seen the statement that the form of a question put to a witness was a matter of discretion with the

Court trying the cause, and that no exception could be taken, or if taken, could avail, based upon the form of interrogatories. It may be, that no judgment has been reversed by this Court for such a cause. I have not examined the Reports to see; but, it is more than probable, that if this objection was the only one to be urged against the judgment in this case, I should not now be urging it. I call attention to it as one of what I claim to be a series of errors, in connection with the testimony of the witness, Miles Murphey—the sum total or result of which, was the admission of much improper evidence. Still, I understand it to be a rule controlling the practice in courts of justice, that leading questions should not be allowed—a violation of which is error cognizable in this and all other courts of record. If this is not so, there is much insisted upon in the recognized text books of the law that might better be left out, for a rule which may or may not be observed by a Court, *in its discretion*, is no rule at all.

Counsel attempts to avoid the force of the objection, by reference to the answer to the question alleged to be leading. He says: "A leading question is one that may be answered with, Yes or No. No such answer was given." I might accept his definition, although a very improper one, and still sustain my objection, for it was properly answerable by a simple affirmative or negative. But counsel say: "No such answer was given." True, the witness did not answer by *Yes or No*, but if this was to determine the application of the rule excluding leading questions, the rule might as well be excluded also. Take this very case—the question was: "State whether or not you said to him, at that time, your house didn't recognize him in the transaction?" This inquiry could be fully answered by "Yes or No." But, if instead of that answer, the witness had said: "I did" or "I did not," or "I did tell him our house did not recognize him," either of which would also answer the question, and would amount to the same as yes or no, then, under the rule as stated by the counsel, the objection, both to the question and answer, would be obviated. The mere statement is *its own* refutation. The substance of things is not changed by the dress they put on. I understand, however,

that a *leading question is one that suggests to the witness the answer he is expected to give.* Whether it is, or can be answered by *Yes* or *No*, is a mere incident; and tested by this definition, I insist that the question objected to, is pregnant with suggestions.

But counsel say again, the answer is unobjectionable. In reply, I concede that an improper question which develops nothing in the answer, cannot be regarded as affecting the result; but this is not such a case. The answer may not be, perhaps is not, all that was intended to be drawn out by the question, still, it is full of insinuation in that direction, and, admitted as it was, against objection, must have had its influence with the jury. I care little, however, for the form of a question. The learned counsel who tried this cause for the defendant in error, would not have allowed their witness to leave the stand burdened with any uncommunicated fact which they deemed important; and the manner in which they should draw it forth may not be of any great importance. What I do object to, is the whole conversation and the admission of it, as a gross violation of the rules of evidence, and a dangerous innovation upon the settled practice of the Court.

These errors of the Court during the trial are, therefore, still insisted upon, notwithstanding the honorable counsel endeavors to make merry over them. As it was the only answer that they could make, I am not disposed to quarrel with it.

A few words in reply to the remarks of the counsel upon the objection to the charge of the Court. I am disposed to concede the great brilliancy and wit of the Bible quotation; it is both original and pertinent. I shall make a somewhat different application of it, however, from that made by the counsel. They say that the words, "There is no God," are found in the Bible, but that it is preceded by words of explanation, so that the whole sentence reads thus: "The fool hath said in his heart, there is no God." In all this, my recollection agrees with that of the learned counsel. I find in the charge of the Court, these words: "Private agreements between the parties are unimportant," but I do not find in

the charge the qualifying prefix of the Bible quotation. If that were there, and the whole sentence read : "The fool hath said in his heart that private agreements between the parties are unimportant," I might object to it as a matter of taste, but the sentiment I should be obliged to concur in. The first part of the sentence which would have furnished the proper qualification of the language of the Court was unfortunately omitted from the charge, and this it was reserved for the learned counsel to introduce; but, as not unfrequently happens, the occasion is ill-chosen, and, therefore, the wit and brilliancy of the allusion are scarcely sufficient to make it respectable.

It is not claimed by me that parties may not make themselves liable as partners beyond the limits of their private agreements. They may represent, and thus make themselves liable as partners in matters without the scope of such agreements. Whether the plaintiffs in error did so or not, was a question of fact for the jury; it was not competent for the Court to say to the jury that their private agreements were unimportant. This striking out of the agreement between Murphy & Allen, left nothing before the jury from which they could find the extent of the partnership in the event of their finding that there was no representation or holding out contrary to their private agreement. In fact, it was saying to the plaintiffs in error, that this issue of partnership shall not, in any event, be influenced by your agreement beetween yourselves. You have made certain representations to the public and to the defendant in error respecting your partnership relations, and by them shall the jury determine your liability. In this, I insist, there is a double error: First, in the exelusion of the private agreemeent entirely, and, Second, in assuming that there were representations and a holding out inconsistent with the agreement.

I will not weary the patience of the Court by a re-argument of the other objections taken to the charge. If the tone and temper of the argument for the defendant in error had been better, or rather if it had an argument, I might have said more or less in reply than I have already done. The conclusion of this very

strange, and to me, unusual manner of treating a case, requires a passing notice. I am content that counsel should pass judgment upon their own motives for taking cases into this or any other Court; but I am not willing that they should constitute themselves the judges of mine. It may be that this Court will conclude that the reasons assigned by me, in good faith, for the reversal of the judgment in this case are insufficient; but professional courtesy, if nothing else, should have caused the learned counsel to hesitate long before giving utterance to the insinuation with which they conclude their remarks. I am pursuaded, also, that Mr. Allen, although the leading banker in the State of Iowa, as little deserves the charge of keeping Killinger's money, as his attorney does the charge of trifling with this Honorable Court.

I had not thought, until it was so characterized by the counsel for the defendant in error, that my comments upon the concluding part of what appears as the charge of the Court below could be construed into a controversy with the Court. I desired simply to call attention to what seemed to me a peculiar feature of the Bill of Exceptions as signed by the learned judge. Such an appendage to a charge is unusual in my practice, and seemed to me to merit the notice I gave it. Disclaiming any controversy, however, with the Court below, as to this or any other feature of the case, I insist that errors have intervened and are manifest in the Record, for which the judgment of the Court below should be reversed.

JNO. N. JEWETT,

Attorney for Plaintiff in Error.

Mr. Justice Clifford

UNITED STATES SUPREME COURT,

DECEMBER TERM, 1868.

BENJAMIN F. MURPHEY AND BENJAMIN F. ALLEN,
Plaintiffs in Error,

vs.

DAVID KILLINGER, *Defendant in Error.*

Error to Circuit Court of the U. S. for Northern Dist. of Illinois.

ARGUMENT AND BRIEF.

FOR PLAINTIFFS IN ERROR.

Beach & Barnard's Steam Print, 122 and 124 S. Clark St.

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Error to Circuit Court of the U. S. for Northern Dist. of Illinois.

ARGUMENT AND BRIEF,

FOR PLAINTIFFS IN ERROR.

The questions to be submitted to the Court upon this record require an examination of the issues formed by the pleadings and presented for trial in the Court below.

The substance of those issues may be briefly stated as follows: The declaration, as originally filed, consisted of two special counts in assumpsit, charging the defendants, as partners, with receiving from the plaintiff a large quantity of slaughtered hogs, and what is termed in the trade, "Hog Product," for sale on commission. The breach assigned in the first count is a failure to account to the plaintiffs for the proceeds of the sale, and in the second, a failure to obtain for said property the best prices. To these, the usual common counts are added.

To this declaration the defendants pleaded separately. First; Non assumpsit. Second; A special statutory plea, denying the partnership or joint liability of the defendants, and alleging that the promises and undertakings set forth in the declaration (if any such there were) were made by the defendant, Benjamin F. Murphey, and Miles Murphey, Robert P. Murphey and Leander E. Murphey, comprising the firm of Miles Murphey & Co., without the defendant, Benjamin F. Allen.

The replication to these special pleas are, that the defendants made the said promises and undertakings, jointly, as partners.

Subsequently, three additional counts were filed, alleging in substance, the delivery by the plaintiff to the defendants at Des Moines, Iowa, of a large number of live hogs to be slaughtered and made into bulk meats and lard, and the products to be shipped to Chicago and sold by the defendants, and the proceeds to be accounted for and paid over to the plaintiffs; and the breaches are, 1st. A failure and refusal to account for and pay over the proceeds. 2d. That the defendants failed to make sales at the best market prices, and refused to account to the plaintiff at the prices for which the product should have been sold. 3d. That the defendants negligently managed the sale of said product, and did not sell for the best prices, but kept the same until prices had declined, and then sold at a great sacrifice, and refused to account for and pay over to the plaintiff the proceeds.

By stipulation, the pleas to the original declaration and the replication thereto, were to be considered as pleaded to these additional counts.

From this statement of the pleadings, it is apparent that the main issue in the case was that of partnership between the defendants, in respect to the handling and sale of the pork product referred to in the declaration.

Referring to so much of the facts, undisputed, as are necessary to an understanding of these issues, it was admitted upon the trial

that the defendants owned a packing house at Des Moines, Iowa, and were engaged there in the business of slaughtering, and packing and curing meats for themselves and others. That during the fall and winter of 1864 they slaughtered and cured for themselves and others, including the plaintiff Killinger, a large number of hogs, the entire product of which was shipped from the slaughter-house to Chicago, consigned to B. F. Murphey, nominally, but actually to the firm of Miles Murphey & Co., a commission house then in good credit and standing, for sale. The defendants had no office or place of business in Chicago, and all this property was received into the warehouse of Miles Murphey & Co.

The plaintiff, who was a drover, was overtaken near Des Moines with bad weather and bad roads whilst on his way to Chicago with a drove of about six hundred and sixty hogs. Instead of driving his hogs to Chicago, he concluded to have them slaughtered and the meat cured at Des Moines. They were driven to the defendants' slaughter house at Des Moines, and were receipted for by the defendants on the 23d and 26th days of November, 1864. (See printed record, p. 31.) They were slaughtered, and the products properly cured and forwarded to Chicago for sale, and received by Miles Murphey & Co., the same as all other products of the Des Moines packing house that year. The plaintiff was in Chicago a good deal of the time during the winter; was frequently at the office of Murphey & Co., enquiring about his meat. A portion or all of his lard was sold whilst he was in Chicago, under his direction, and he received $4,000 of the proceeds in the office of, and from, Murphey & Co. In the spring, and before the balance of his meats were sold, or at any rate, before he had further proceeds of sales, the firm of Murphey & Co. failed for a large amount. There is no complaint of carelessness or negligence in entrusting the property to Miles Murphey & Co., but the plaintiff insisted that Murphey & Allen, the defendants, not only slaughtered the hogs, but also had charge of the selling in Chicago, and that they were, therefore, responsible to the plaintiff for the management of the product and the proceeds thereof. The defendants, on the other

hand, insisted that they were slaughterers and packers merely, at Des Moines. That the partnership between Benjamin F. Murphey and Mr. Allen related solely to the business done at the slaughter house, and that, as partners, they fully performed their contract with the plaintiff when they turned over the product of the plaintiff's hogs to Murphey & Co. for sale, and that the plaintiff acquiesced in, and ratified (if ratification was necessary) this action of Murphey & Allen in relation to the disposition of his meat after it was in Murphey & Co's. possession.

The arrangement, whatever it may have been, in respect to the hogs, was made at Des Moines, with defendant Allen alone, and it was claimed by the defendants, that if that arrangement contemplated anything beyond the slaughtering, curing and shipping of the hogs, it was, as to anything beyond that, an individual undertaking of Mr. Allen, and in the nature of a guarantee of the responsibility of the firm of Murphey & Co.

I have thus briefly alluded to some of the outlines of the case in its facts, simply for the purpose of showing in what form the issue of co-partnership, so distinctly made by the pleadings, was developed upon the trial, and the bearing of what are now alleged to be errors in the rulings and decisions of the Court below; and those errors I will now refer to in their order, as they appear upon the record.

I.

At page 16 of the printed record, is the beginning of a series of questions and answers, relating to an interview between the witness, Miles Murphey, one of the firm of Murphey & Co., and the plaintiff, Killinger, which were admitted by the Court against the objection of the defendants, and to their admission the defendants duly excepted at the trial. The witness says: (Record, page 16.) "I remember of the plaintiff's coming down to see me at my resi-"dence in Indiana, with reference to the hog product. He saw

"Frank here when he came back. He came over there to see me "about it. I don't know as I am able to state what he said, and "what I said to him. He came to my house, and we had a talk. "He said that he was hunting his money, and wanted to know "where to get it."

Ques. "State what conversation you had, and what you said to him?"

This question being objected to, the plaintiff's counsel made the following statement: (Record, page 17.) "I shall expect to prove "by another witness that Killinger was sent by B. F. Murphey to "Miles Murphy with reference to these hogs, and, therefore, I sup- "pose the conversation is competent." And upon this statement of counsel, the objection was overruled, and the ruling excepted to.

Ans. "I will state the substance. He said he had come down "to hunt his money. That he was out of money, and that he had "placed some hogs in Allen's hands in Des Moines."

Defendant here objected to any conversation between plaintiff and witness, relative to defendant Allen's agreement or arrangement with plaintiff, as incompetent evidence, being but hearsay.

Objection overruled and defendants excepted, and the witness then proceeded to give, what he terms, the substance of the conversation between himself and Killinger.

Ques. "State whether or not you said to him at that time your "house did'nt recognize him in the transaction."

Question objected to by defendant's counsel as leading, and calling for statements of third parties in the absence of defendants, which cannot be competent evidence against them. Objection overruled, and defendant excepted.

This statement, partly quoted from the record, shows the charac-

ter of the evidence admitted on the trial, on behalf of the plaintiff below, the circumstances of its admission, and the exceptions of the defendants thereto; and it is now insisted that, in overruling the objection of the defendants and permitting these questions to be asked and answered by the witness, the Court below erred.

It is a general rule as to the admissibility of evidence, too well understood to require authority in support of it, that the declarations or statements of third parties cannot be received in evidence, either for or against the parties in Court. They are at best only hearsay, and if admissible, would place the rights of parties at the mercy of idle rumors, which too frequently have no foundation in fact or reason. Of this character, most certainly would be a conversation between the witness and Killinger called for by the interrogatories above quoted. What the witness may have said to Killinger during the interview, might be very different from what he would say under the sanction of an oath. What Killinger might say to the witness, although being a competent witness he might be called to swear to, yet, coming as a conversation, and as a mere statement of what he said, if received in evidence is not sworn to, and therefore wants the legal requisite of competency in this respect.

Evidently the plaintiff's counsel appreciated this objection to the evidence he was seeking to get before the jury, and therefore made an attempt to avoid it. The attempt, however, failed to remove the objection for two reasons, which I will briefly notice.

I recognize the rule laid down by Greenleaf in his treatise on the Law of Evidence, vol. 1, sec. 182—that "The admissions of a "third person are also receivable in evidence against the party, "who *has expressly referred another to him* for information in re- "gard to an uncertain or disputed matter. In such cases, the party "is bound by the declarations of the person referred to, in the same "manner and to the same extent as if they were made by him- "self."

Evidently under this rule, or rather this exception to the general rule, the conversation between the plaintiff, Killinger, and the witness, was sought to be introduced. Being an exception to a general rule, the party seeking to avail himself of it must bring himself strictly within its provisions, and, therefore, before the conversations referred to could be admissible, as an admission of Miles Murphey, it should have been shown, that the parties against whom the admission was offered had expressly referred the party offering the evidence, to Miles Murphey for information. The language of the exception, as stated in Greenleaf, is, that such admissions are receivable in evidence against the party, who *has expressly referred another to him* for information, etc. The italics are those of the text from which I quote. The evidence was offered generally, and against both defendants, who had pleaded separately. It was not preceded by any proof that the defendants *had expressly referred* Killinger to Miles Murphey for information upon any subject; but instead of such proof, the plaintiff's counsel stated as follows: "I "shall expect to prove by another witness that Killinger was sent "by B. F. Murphey to Miles Murphey, with reference to them "hogs." (Record, page 17.)

It is undoubtedly competent for a Court, in the progress of a trial, to accept the statement of counsel as to what he expects to prove at a later stage of the trial as a foundation for the introduction of testimony incompetent at the time it is offered. But in such a case, the statement of counsel as to what he expects to prove, should contain the facts which, when proved, will render the objectionable testimony clearly competent. The statement is then received by the Court upon the professional honor of the counsel as a substitute for the preliminary proof. If the statement of counsel does not set forth such facts, the Court should exclude the testimony.

The objection to the statement of the counsel here made is twofold.

1st. It does not contain any statement of an expectation to prove that Killinger was sent to the witness "*for information.*"

2d. It does not connect the defendant Allen, in any way, with the sending of Killinger to the witness.

From the very character of this evidence, and the circumstances under which it is admissible, it cannot be received unless it was, presumably at least, the intention of the party against whom it is offered, that the information obtained by means of the reference, should be binding upon him. Therefore, the particular purpose for which the reference was made should appear. The exact point of inquiry, in relation to which the answer of the person referred to, was to be binding, should be made manifest. Can the purpose of sending Killinger to Miles Murphey, or the subject of the information he was to get, be inferred from the counsel's statement? Beyond the fact that it had some connection with hogs, nothing can be understood from it. Suppose B. F. Murphey sent Killinger to Miles Murphey to get pay for the hogs, as the fact undoubtedly was, would that make the conversations between these parties upon all questions concerning the hogs, competent evidence against B. F. Murphey? Sending Killinger for that purpose, would, I suppose, be a sending "with reference to the hogs"—but it would hardly be a reference of Killinger to Miles Murphey for information concerning the relations of Allen & Murphey, and the undertakings of Mr. Allen in respect to these hogs; nor could B. F. Murphey by referring Killinger to Miles Murphey for payment, understand, or be supposed to have in contemplation, that he was committing himself to whatever statement Miles Murphey might make in relation to the transactions of Allen, or Allen and Murphey.

The cases cited in Greenleaf on Evidence as authority for this exception to the general rule of evidence, are cases in which the party, whose statements were introduced, was expressly referred to for special information, or in which it appeared that the party against whom the statements were offered, had expressly agreed to be bound by the explanation which the person referred to should make. But even if B. F. Murphey could be held bound by the statement of Miles Murphy, by reason of his "sending" Killinger to him, certainly it cannot be contended that Mr. Allen would be

thus bound. He did not participate in the sending, nor was he in any manner concerned therein; and yet the Court, against objections made at the time, permitted the witness to detail the conversation between Killinger and Miles Murphey relating to the original arrangement between Killinger and Allen. The result of this permission was, that Killinger placed before the jury, without the sanction of an oath, and without being liable to cross-examination, his version of his arrangement with Mr. Allen. The pretence for permitting this was, that B. F. Murphey, not Mr. Allen, had sent Killinger to Miles Murphey "in reference to them hogs." The pretence lacks every element of reason and authority, and may as well be abandoned; and the proposition be announced boldly, that every conversation between one party to a suit and a witness is, competent evidence against the other party. This would be an easy way to manufacture testimony without the slightest responsibility for its truthfulness.

There is one other point of objection to this testimony, which may be somewhat technical in its character. It relates more especially to the last interrogatory but one on page 17 of printed record, which is as follows:

Question. State whether or not you said to him at that time, your house did'nt recognize him in the transaction?

This question was objected to as leading, and also, for the reasons above stated, applicable to the preceding ones. The rule in respect to the putting of leading questions to a witness on direct examination, and for determining what are leading questions, is well stated in 1 Greenleaf on Evidence, sec. 434, with references to Starkie on Evidence, 149, and 2d Phillips on Evidence, 401. I insist, that under the rule thus laid down, the objection to this question should have been sustained, and that the Court below erred in overruling it.

II.

On page 18 of printed record is contained one further exception to the ruling of the Court below, in the course of the direct examination of the witness Miles Murphey. The question propounded to the witness was as follows :

" State whether or not you understood from Frank Murphey, or what you understood from him with reference to the extent of that partnership," (meaning the partnership between Murphey and Allen) with reference to the meat—how far it extended ?"

This question was objected to on the ground that it is not competent to prove the relation of partnership by the admissions or statements of one of the alleged partners.

It must not be overlooked that the joint or partnership liability was in this case, and under the pleadings, the material issue—that this joint or partnership liability was denied by both the defendants separately, and that no proof against that denial had been made in the case, up to the time this question was put to the witness.

In Collyer on Partnership, the rule is stated in this language, sec. 776 : " But the act, admission or declaration of one partner is not evidence to prove the partnership against the other defendant." And the authorities cited in the foot note amply sustain the text, and they are numerous enough to give the proposition the force of settled law. And under these authorities, it is now insisted that the Court below erred in overruling the objection to the interrogatory, and in admitting the evidence which it was the purpose of the interrogatory to call out.

III.

In reviewing the whole record of this case up to, and including the charge of the Court to the jury, one of two conclusions becomes irresistible, viz., either much time was needlessly consumed upon

an immaterial issue, or else the learned judge, who presided at the trial, misapprehended the issue and the whole character of the controversy. Without assuming more than is consistent with the highest respect for the learned judge, I am compelled to submit, that the latter is the only conclusion which is at all admissible; for throughout the whole charge there is not one allusion to the issues in the case, nor to the law which should control the jury in the determination of these issues. I therefore submit, that the whole charge, whilst taken by itself and in a proper case, it would be free from objection, yet under the issues and facts presented, is one grand mistake.

I call attention to the first paragraph of the charge, which was excepted to as evidence of this, in which, ignoring the issue of partnership, the learned judge proposes to the jury, as the inquiry of first and paramount importance, whether the hogs were delivered to the defendants to be cut, packed and transferred to Chicago, and sold by the defendants, or whether it was the agreement that the hogs should be delivered to the defendants, to be cut and packed, and transferred to Chicago, to be sold by agents.

And then, repeating in more concise language, he says: "Were the hogs to be sold by defendants, or by an agent of defendants?" And he instructs the jury that this is a question of fact to be determined by the testimony.

The statement of these inquiries, thus put to the jury, contains an assumption of every question of fact in the case against the defendants below. By their pleas they denied that they had undertaken etc., jointly as partners, to sell this pork, and account to the plaintiff, whilst the Court, by the questions submitted to the jury, simply asks them to decide whether the defendants undertook to sell the pork by themselves or by their agents, which plainly assumes that they did undertake to sell either by themselves or their agents. It is not very apparent to me, how the answer which the jury might make to this question could vary the results of the case; for

whether the defendants undertook to sell by themselves, or their agents, could in no manner affect their liability. They would be liable for proper sales and accounting upon either undertaking; so that, in effect, this part of the charge not only assumed a joint undertaking by the defendants ignoring the issues, but stated the remaining questions in such a way, as to leave the jury no alternative, under the law, but to render their verdict against the defendants.

I suppose that the charge of the Court to the jury should be in such clear and positive terms, as at least to be easily understood by men of ordinary intelligence, and that it should not be ambiguous or liable to misinterpretation. Considered with reference to such requirements, the part of the charge above referred to, is plainly objectionable under the issues and facts of the case. B. F. Murphey and Mr. Allen were operating the packing house at Des Moines. They were tenants in common of the packing house, and partners in the business carried on in and by means of it. This was not denied at any time. But there, it was claimed, their joint interests and partnership ceased. The arrangement with Killinger, whatever it may have been, was made with Allen alone at Des Moines. About this there was no question. If Allen agreed to do more than slaughter, cut, cure and ship the hogs, it was insisted that what he undertook beyond this, was without the business of the partnership, and not binding upon Murphy. That it was his individual undertaking and agreement, for which he alone was responsible. Killinger was dealing with the parties for the first time, and was bound, at his peril, to take notice of the extent of the partnership between Allen & Murphey, and of the limits of the authority of one partner to bind the other.

But the charge of the Court nowhere pays respect to this condition of the parties, but leaves the jury to find whether or not there was an agreement with Killinger to sell and account for the proceeds, as well as to slaughter, cure and ship. If they found, under such a charge, that Allen did agree to sell and account, either by himself or his agents, they might fairly infer that they were re-

quired to find their verdict against the defendants, even though the partnership of Murphey & Allen did not in fact extend beyond the business at Des Moines.

But not only does the charge of the Court fail to present to the jury the law pertinent to these relations of the parties, but passing to the next portion of the charge excepted to, and it distinctly tells the jury that the "private agreements between the parties," (Murphey and Allen) "are unimportant," which is as much as to say to the jury, that it makes no difference in the result of this case whether the partnership of Murphey & Allen was limited to the business at Des Moines or not. Their agreement, limiting it to that business, is not to be considered even as one fact in the case. This, surely, is setting at naught the agreements of parties most effectually, and it is impossible in any view of the case, to make this positive statement of the charge consistent with the rights of parties or a reasonable administration of the law. It would seem quite beyond the reach of probability that a case should arise relating to the fact and extent of a partnership relation, in which it would not be proper to consider the agreement of the parties in connection with other facts which might be developed. Certainly there was nothing in this case calling for, or which could make appropriate, such a total extinguishment of the private agreements between Murphy and Allen, in deference to what might be called their mere public acts and representations. If we bring this part of the charge down to its bearings upon the facts of the case, it is apparent how potential its influence must have been with the jury in determining the issues presented to them. Killinger, himself, says, (Record, page 23) that at the time he made the arrangement with Allen at Des Moines, he did not know Mr. Murphey and had never seen him; and the probability is that he had never heard of the firm of Murphy & Allen until he took his receipts for his hogs in that name at the Des Moines packing house, (Record, page 31) which show on their face that the firm received the hogs for slaughtering and packing only. I might well claim from this record that the firm of Murphy & Allen never

held themselves out to the world or to the plaintiff, "as engaged in any other business than that of slaughtering and packing at the Des Moines house, and that there is nothing in the record for the inquiry of the Court: "How did they hold themselves out to the world and to the plaintiff;" immediately following the sweeping out of sight of their private agreements, to rest upon. It is not necessary, however, to go so far, and I fairly state the case upon this point for the defendant in error, ~~which~~ I concede for the purpose of stating the fallacy of this part of the charge, that there was some evidence tending to show that the parties acted as though they were partners outside of the packing house. Conceding this evidence to be such, it is still flatly contradicted by the testimony of Mr. Allen and B. F. Murphey, and should not the jury be left to a careful consideration of the testimony on this point, with the view of determining whether the parties did hold themselves out to the world and the plaintiff, otherwise than as provided in their agreement. Suppose the jury—it being left to them under proper instructions to determine the fact—had found that Murphey & Allen did not hold themselves out to the world, or to the plaintiff, otherwise than as their private agreement provided; or suppose they had found that the acts or representations relied upon to extend their partnership liability did not amount to a holding of 'themselves out to the world and to the plaintiff,' what could the jury do under the positive instruction of the Court that, 'private agreements between the parties are unimportant.'"

Under such instructions of Courts, there is and can be no limitations put to partnership relations. One partner may run riot with the substance and credit of his co-partners, involving them in operations and responsibilities, which they never dreamed of undertaking, for, by the Court, they are told that their private agreements are unimportant. I submit, that the novelty of this doctrine, which, so far as I have been able to discover, is its only merit, ought not to commend it to a place in the settled jurisprudence of the country. And that for this most manifest error of the charge of the learned judge, the judgment in this case should be reversed.

This misunderstanding of, or failure to appreciate the issues made on the pleadings and the proofs, does not disappear in any part of the charge, for in the following paragraph the learned judge says: "But the main question is, was it the arrangement to "transfer the pork to Chicago to be sold by a house there—no "matter what house? If so, ~~your~~ faith relieves the defendants good "from responsibility. If you find there was no agreement that "the pork was to be sold by Murphey & Allen, the plaintiffs' case "fails." Arrangement and agreement with whom? Of course with Killinger, as one party, but who was the other? A quick perception and knowledge of the law would answer, Murphey & Allen must be the other party; but juries are not supposed to have that quick perception and knowledge of the law, hence the necessity and the requirement that they should receive instruction from the Court. And the jury are nowhere in this charge told that Allen could make an arrangement or an agreement with Killinger which would not be binding upon Murphey; but on the contrary, they are told, in substance, by the language above quoted, that if there was any arrangement or agreement that the pork was to be sent to Chicago and sold, they must find their verdict against the defendants. It might well be under the evidence, and this was a point presented on the trial, that both defendants, but in different capacities, were liable to the plaintiff—Allen, by reason of his special agreement with Killinger, if he made such a special agreement, and B. F. Murphey, as a member of the firm of Miles Murphey & Co., who received and sold the pork, and yet the action not be maintainable, because the two characters and conditions of liability cannot be joined in one action. And if submitted to them fairly, the jury might have so found; but the instructions of the Court gave the jury no opportunity to consider the case under this aspect; but on the contrary, fairly gave them to understand, that if they found that an agreement to sell in Chicago, was a part of the original arrangement with Allen, their verdict must be against the defendants.

The next exception to the charge of the learned judge, is to another substantial direction to the jury, to disregard a part of the testimony in the case. In order that its bearing may be understood, a brief statement of the proof becomes necessary. Killinger, during his examination, stated his arrangement with Allen somewhat differently in form at different times, but on one occasion, at least, he stated that Allen was to do with his (Killinger's) meat, as he did with his own. The language (Record 22) is, "says I, Mr. Allen, I am going home, and says I, you handle my pork just the same as you would your own, and when the thing is at an end I want to settle with you, and look to you for my money; says he, I will." Mr. Allen individually controlled the disposition of the product of all the hogs slaughtered at Des Moines, except Killingers, by reason of the advance made by him for their purchase, and according to all the testimony upon the subject, the proceeds of sales were to be deposited to his (Mr. Allen's) credit in the Union National Bank of Chicago. This, Mr. Allen and Mr. B. F. Murphey both state. And Mr. Allen also says, (Record 79) referring to his arrangement with Killinger, "I asked him what I should do with the product. He says, 'do with it the same as you do with your own.' He said he was going East, and I must do the same as with my own. After it was packed and cured, or partly cured, it was shipped the same as my own and others, that was shipped from there that I had under my control."

But Killinger did not go immediately home, or if he did, he returned to Chicago, and then saw this pork and lard in the house and possession of Miles Murphey & Co. A part or the whole of his lard was sold by the house of Miles Murphey & Co. B. F. Murphey being the salesman, and the proceeds, $4,000, were paid over to him; and upon going away, he instructed them, in case of further sales, to deposit proceeds to his credit in the Fifth National Bank, (Record 26 and 113.)

It was claimed on the trial, and properly, I submit, that this interference, by Killinger, with his meat in Chicago, and changing

the course of the business, it being made known to and acquiesced in by Allen (Record 102), was evidence of a change in the original understandings and obligations of the parties; that at least it was some evidence of such change, proper to go to the jury and to be weighed by them in connection with other facts in the case; and that the direction given by Killinger as to the deposit of the proceeds was a material fact in this connection, and yet the Court, in the charge, we are considering, says: "The direction to pay the money into the Fifth National Bank is wholly immaterial matter."

The theory of the learned judge, upon which he based this doctrine, judging from the context, was simply this: that it was Killinger's meat, and he had a right to take charge of it and its proceeds. This is not denied. His right to take it out of the hands in which he had placed it, is unquestioned. But that is not the point at all. It is claimed in this case, and that is the foundation of the plaintiff's action, that he had made a special arrangement with Murphey & Allen, by virtue of which, he is seeking to make them responsible to him for the value of this identical meat, and to this claim it is replied, that he took the meat out of the control of Murphey & Allen, assuming authority over it, and over the disposition of the proceeds, inconsistent with that special agreement, and, therefore, Murphey & Allen are discharged. And it is insisted, that the directions which he gave are at least competent and material evidence, tending to establish this defence, and that it should have been submitted to the jury as such. True, the Court afterwards puts the question to the jury: "Do you believe there was any change in the agreement of the parties?" almost, if not quite, assuming thereby that there was an agreement originally such as was claimed by the plaintiff, and from the fact of putting such a question, the jury might infer, although they are not so told, that if the change was made they might find for the defendant; but even this is done after they have been instructed that the evidence relating to the change was "wholly immaterial," an error and mis-direction on the part of the learned judge, as it seems to

me, too palpable for discussion, which may have controlled the verdict of the jury, and for which, the judgment should be reversed.

I do not care to discuss further, in detail, the objections to this charge. As before stated, I claim that it is, throughout, based upon a misapprehension of the issues in the case, and consequently of the law, which should control the results of the case. More than this, it takes away from the jury evidence introduced by the defendants, material and pertinent to these issues, and which should have been considered by the jury in determining them.

I may, perhaps, venture a suggestion respecting the last clause of the charge as it appears in the record, cautiously, however, lest I say more than is proper, or less than it deserves. In self-defence, at least, I may be permitted to state, that in the bill of exceptions, as presented to the learned judge of the Court below for his signature, endorsed with the approval of the counsel for the plaintiff, the charge of the Court ended at the last exception. The addition was unknown to me until the record was delivered by the clerk just in time for transmission to this Court. The learned judge and I would differ as to whether this addition, or the substance of it, was in the charge as given to the jury. This difference of recollection or opinion, however, is immaterial, for the record shows it, and this concludes me; but, I cannot well see how there can be any difference of opinion as to the propriety, or rather the impropriety, of the form in which the addition now appears. It does not pretend to be what the learned judge said to the jury, but is an appendage, "*sui generis*," to what is said. It shows for itself, both what it is, and how it comes there. The chief question now is, how, being there, shall it be construed? I do not suppose that the learned judge, by putting it there, intended to deprive the defendants (now plaintiffs in error) of the benefit of their exceptions to the charge, or of any errors which had possibly been committed in the progress of the trial, and it must, therefore, be regarded rather in the light of a commentary on the charge as it was actually given. It must be construed in harmony with what precedes in regular form,

for it does not attempt to correct or change, in language or substance, that which precedes it as the charge of the Court. Regarded in this light, it adds nothing to, and takes nothing from, the charge itself, and it must have been so intended by the learned judge; otherwise he would have embodied it in the charge in suitable language to make it homogeneous, and in the form of a correction of that which was copied into the bill of exceptions as his charge in fact, and would also have called the attention of counsel to the amendment before returning it to the files of the Court.

Regarded in any light, however, it does not, in form or in substance, cure the errors and mis-directions of which the plaintiffs in error complain. And for these errors and mis-directions, as well as those pointed out as occurring during the progress of the trial, it is insisted that the judgment of the Court below should be reversed.

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